Federal Court  Cour fédérale

Date: 20120130

Docket: T-1344-11

Citation: 2012 FC 110

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 30, 2012

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

CANADIAN UNION OF POSTAL WORKERS

Applicant

and

CANADA POST CORPORATION AND ATTORNEY GENERAL OF CANADA

Respondents

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] On June 26, 2011, the *Restoring Mail Delivery for Canadians Act*, SC 2011 c 17 (special Act) was given Royal Assent. Under section 8 of the special Act, on July 22, 2011, the Minister of Labour (Minister) appointed the Honourable Coulter A. Osborne arbitrator for final offer selection in the interest arbitration between the Canada Post Corporation (employer) and the Canadian Union of Postal Workers (union).

[2] The union is now asking the Court to quash this decision on the grounds that the Minister unreasonably exercised her discretionary power by ignoring two essential qualifications required of the arbitrator, that is, that he or she be bilingual and have a certain amount of recognized expertise in labour relations.

[3] On October 20, 2011, the Court ordered a stay of proceedings before the arbitrator until a final determination could be made on the application for judicial review (2011 FC 1207), which was appealed by the employer (A-414-11). The merits of the application for judicial review were to be heard on January 24 and 25, 2012. However, the arbitrator quite elegantly resigned on November 1, 2011, leaving the Minister to appoint a new arbitrator.

[4] Almost three months have passed, and the Minister has not yet appointed a new arbitrator. In fact, on January 24, 2012, the Court concurrently heard a motion to dismiss filed by the Attorney General of Canada (respondent) and the union's application for judicial review.

[5] The employer chose not to take a position on the merits of the application for judicial review whereas the respondent asked for its dismissal, maintaining, first, that the application had become moot and, in terms of its merit, if the Court exercises its discretionary power to hear and determine the issue, that the Minister's decision was not unreasonable. Incidentally, the employer submitted to the Federal Court of Appeal that [TRANSLATION] "a live controversy still exists between the parties" (employer's written submissions dated December 16, 2011, docket A-414-11).

Respondent's application for dismissal

[6] The legal principles underlying the application of the mootness doctrine are set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342. They involve a two-step test that calls for the Court to exercise its discretion.

[7] The Court first determines whether an actual dispute still exists between the parties or whether the tangible and concrete dispute between the parties has in fact disappeared.

[8] In the latter case, the Court will examine the appropriateness of determining the issue on the merits, taking into account the existence of an adversarial context, concern for judicial economy and the law-making function of the Court. The Court may also attribute more or less weight to each factor and may also take into account any other relevant factors depending on the particular circumstances of the case.

[9] There are three parties in this matter: the union, the employer and the respondent. All have distinct interests, whether as bargaining agent, company or government.

[10] The union submits that quashing the Minister's decision, despite the arbitrator's resignation, would be useful and constitutes an appropriate remedy under the circumstances. The union also maintains that it has already suffered greatly by having the proceedings conducted under a unilingual arbitrator and that the only remedy for this is to quash the Minister's decision and start everything afresh before a new arbitrator.

[11] We are talking about having a third party that is not proposed by the employer and the union imposing a collective agreement that will govern the parties until January 31, 2015, through a final offer arbitration process. I am in agreement with the respondent that the arbitrator's resignation does, to a certain degree, render moot the preceding ministerial appointment. However, there continues to exist between the parties a dispute on the legality and judicial effects of decisions rendered by the arbitrator. In any case, whether or not a tangible dispute still exists, in looking at the second part of this test, this is an issue of national significance for which the Court must exercise its discretion to hear the case, taking into account the adversarial context involved, concern for judicial economy and the overall role played by the Court.

[12] As of the date of this ruling, since the Minister has opted not to appoint a new arbitrator, a mystery still exists regarding the scope of ministerial discretion and the overall qualifications of the person to be appointed as final offer arbitrator. In fact, at the hearing held on January 24, 2012, the respondent's counsel was unable to confirm to the Court whether the future arbitrator would or would not have labour relations experience or be bilingual. Given this uncertainty, a gamble cannot be taken. It will therefore be necessary to start the judicial process anew in the very short term in order to make a final determination on ministerial discretion if the Minister should ignore any proposals of qualified, bilingual arbitrators who might be confidentially suggested by the employer or the union, and choose someone who may not have any recognized labour relations expertise or be bilingual.

[13] However, the Court has already done its utmost to hear the application for judicial review and has made considerable efforts to determine the issue on its merits within a short three-month

period. From the outset, the employer has taken the position that the issue of the legality of the arbitrator's appointment is within the ambit of the respondent, given that the latter had previously expressed the desire to no longer be named in the proceedings as a respondent, while, at the same time, being strongly opposed to the stay of the arbitration proceedings. This strongly favours having the issue of ministerial discretion and the arbitrator's qualifications determined earlier rather than later so as to avoid another motion for a stay of proceedings before another arbitrator.

[14] In the interests of justice and given the fact that the Court is now able to determine issues relating to the constitutionality and legality of ministerial decisions, there is reason to dispose of the matter on its merits since the Court has had the benefit of reading the union's and the respondent's written submissions and of hearing their counsel for an entire day. Moreover, counsel for the employer attended the hearing on January 24, 2012.

[15] Consequently, the respondent's motion for dismissal is dismissed, with costs.

Legality of the privative clause

[16] First, with respect to the Court's power to examine the legality of the arbitrator's appointment and of any of the arbitrator's actions or decisions, section 12 of the special Act has all of the characteristics of a classic privative clause. However, the respondent submits that the privative clause must be interpreted narrowly in order to respect the rule of law, which protects the courts' constitutional role of reviewing the legality of actions taken by governments and administrative tribunals.

[17] I agree with the respondent's approach.

[18] Consequently, there is no reason to issue an order striking down section 12 of the special Act or to declare the section constitutionally inapplicable, as urged by the union.

Standard of review

[19] The Minister does not have decision-making power as such since she does not determine the parties' rights under the collective agreement. In fact, the duty to choose the final offer of either the employer or the union rests exclusively with the arbitrator appointed by the Minister under section 8 of the special Act.

[20] However, it is the Minister who appoints the final offer arbitrator, and, in this regard, it can be said that the decision has a concrete impact on the arbitration process. The selection of a "qualified" arbitrator is not a trivial or gratuitous exercise. Otherwise, the Minister would choose the first person who comes along or would merely choose among the names of qualified arbitrators submitted by the employer or the union.

[21] It should be said in passing that the Minister often has to appoint arbitrators under the provisions of the *Canada Labour Code*, RSC 1985, c L-2, when the parties to a collective agreement do not agree on an arbitrator. In such a case, the Minister chooses someone whose name appears on a list of arbitrators drawn up by the Labour Program. In the case at hand, the Minister did not choose from among the names proposed by the parties or from among the names of arbitrators listed in the collective agreement or on the Labour Program's list.

[22] Given the nature of the decision involved, the Minister's institutional expertise and the existence of a privative clause, the Court agrees with counsel for the union and the respondent that the appropriate standard for this decision is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9).

Scope of ministerial discretion

[23] It goes without saying that the arbitrator appointed under section 8 of the special Act must be independent and impartial. The arbitrator must also be "qualified" according to the Minister. In this case, the respondent would like the exercise of ministerial power, which it considers discretionary, to not be subject to any constraints, limits or criteria regarding the arbitrator's qualifications or competence. In other words, the Minister would merely have to act in good faith and deem the person "qualified" for the Court's judicial review exercise to end there.

[24] The Court disagrees with the respondent. This is not what is indicated by common sense, case law, the scheme of the special Act or the specific labour relations context that govern the parties to the collective agreement. However discretionary a ministerial appointment may be, there is no such thing as absolute discretion (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817).

[25] In exercising her power to appoint an arbitrator of her own choosing, the Minister must not give way to gross unfairness or unduly penalize the employer or the union, or create such uneasiness or uncertainty as to call the credibility of the final arbitration process into question.

[26] However, this is in fact what could happen if the Minister were to ignore all of the candidates proposed by the parties to the collective agreement, thus *prima facie* acceptable, and appoint someone whose language qualifications or recognized labour relations expertise are highly disputed by either party to the collective agreement, i.e., the union, in this instance.

[27] In such a case, the Court must be able to examine the reasonableness of the Minister's decision, which implies a review of the grounds, if any, in light of all of the evidence on record and of the parties' submissions.

[28] In the case at hand, the lack of transparency inherent in the appointment process followed by the Minister, the limited evidence or supporting grounds provided by the Minister and the laconic nature of her communications raise serious questions and indicate that the Minister appears to have failed to analyze, as relevant criteria, the person's previous labour relations experience and the bilingualism requirement stemming from the specific context under which the final offer arbitrator would have to make his or her final decision.

[29] The Court finds that the decision dated July 22, 2011, is unreasonable and must be quashed.

Experience in labour relations

[30] The respondent suggests that the special Act does not require the appointed arbitrator to necessarily be familiar with the postal sector or have recognized experience in labour relations. However, to argue that the law allows the Minister to choose, as she pleases, an individual who has

no recognized expertise in labour relations is to suggest that, ultimately, the eventual decision of the final offer arbitrator should not warrant any deference. The final offer arbitrator is either a specialist or a generalist. In this case, the Court believes that the arbitrator must be a specialist with relevant experience in labour relations.

[31] The respondent argues that, because the special Act does not explicitly empower the final offer arbitrator to interpret or apply work-related legislation, it must therefore be assumed that the arbitrator does not need relevant expertise in labour relations or to be familiar with working conditions or the postal sector. I disagree. As far as the Court is concerned, the scheme of the special Act and, more particularly, the privative clause, calls upon higher Courts to not substitute their opinion for that of the arbitrator concerning the final offer that is to constitute the next collective agreement.

[32] By its very nature, the current interest arbitration requires the final offer arbitrator be able to exercise exceptional and specialized expertise, since she or he will have to write a decision that will serve as the next collective agreement (subsection 11(4) of the special Act). The postal workers' collective agreement contains a complex set of various provisions that govern the full range of working conditions of the workforce, which is composed of some 50,000 postal workers. Both parties to the collective agreement must provide the arbitrator with a list of unresolved issues, among other things.

[33] In making the selection of a final offer, "the arbitrator is to be guided by the need for terms and conditions of employment that are consistent with those in comparable postal industries and that

will provide the necessary degree of flexibility to ensure the short- and long-term economic viability and competitiveness of the Canada Post Corporation, maintain the health and safety of its workers and ensure the sustainability of its pension plan" (subsection 11(2) of the special Act).

[34] Such a legislative framework suggests that, from the start, the decision-maker will have some expertise pertaining to issues mentioned in sections 10 and 11 of the special Act before accepting a mandate from the Minister. Moreover, the answers the Minister gave before the Senate during the discussions on the special bill seem to suggest that the selected individual would have some recognized labour relations experience that is relevant to the numerous narrow issues the arbitrator would have to decide before choosing a final offer.

[35] In the workplace, the collective agreement is the highest law, the constitution binding the employer, bargaining agent and employees of the bargaining unit. According to the traditional model, a collective agreement, freely negotiated and agreed to, must ensure security for all parties, ensure that industrial peace is maintained and that the company will be able to complete its projects while respecting the legitimate aspirations of the workers. Of course, a collective agreement is never perfect and is not a panacea. A product of numerous compromises, the collective agreement is revised and amended by the parties during each collective bargaining process. Reciprocal concessions that each party makes, in secret, behind closed doors, are all part of the intricacies of collective bargaining.

[36] Over time, and after many years, grievance arbitrators who in turn interpret a collective agreement can gain a privileged outlook on the customs and practices of the parties. Nevertheless, in

spite of the expertise they acquire over the years, grievance arbitrators must earn their appointment as interest arbitrators. Claiming the rights of any legislator, the parties to the collective agreement do not really appreciate sorcerer's apprentices. To be able to decipher the codes and use the keys to labour relations that are specific to the parties and the company, a whole universe must be known and discovered. This can require years of experience. This is why both parties to a collective agreement are generally very reluctant to have a third party intervene and establish the content of the agreement. When this happens, the parties usually expect a seasoned third party who possesses recognized experience in the field of labour relations, and preferably someone who has some knowledge of the company and the challenges of the industry in which the company operates.

[37] In *CUPE v Ontario (Minister of Labour),* 2003 SCC 29 (CUPE), Justice Binnie, writing for the majority of the Supreme Court of Canada, wrote about the binding arbitration process used in the hospital sector in Ontario under the *Hospital Labour Disputes Arbitration Act* (HLDAA):

> 108 Compulsory arbitration is a fairly well-understood beast in the jungle of labour relations. Dickson C.J., dissenting on other grounds in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, pointed out, at p. 380:
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> > The purpose of such a mechanism [compulsory arbitration] is to ensure that the loss in bargaining power through legislative prohibition of strikes is balanced by access to a system which is capable of resolving in a fair, effective and expeditious manner disputes which arise between employees and employers.
>
> 109 Labour arbitration as a dispute-resolution mechanism has traditionally and functionally rested on a consensual basis, with the arbitrator chosen by the parties or being acceptable to both parties. The intervener, National Academy of Arbitrators (Canadian Region), contended that "[a]rbitration which is, or is seen to be, political rather than rigorously quasi-judicial is no longer arbitration". Moreover, the intervener contends:

> If arbitrators are, or are perceived to be, a surrogate of either party or of government, or appointed to serve the interests of either party or of government, the system loses the trust and confidence of the parties, elements essential to industrial relations peace and stability. . . . A lack of confidence in arbitration would invite labour unrest and the disruption of services, the very problem impartial interest arbitration was designed to prevent.
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> . . .
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> 111 I conclude, therefore, that, although the s. 6(5) power is expressed in broad terms, the legislature intended the Minister, in making his selection, to have regard to relevant labour relations expertise as well as independence, impartiality and general acceptability within the labour relations community. By "general acceptability", I do not mean that a particular candidate must be acceptable to all parties all the time, or to the parties to a *particular HLDAA* dispute. I mean only that the candidate has a track record in labour relations and is generally seen in the labour relations community as widely acceptable to both unions and management by reason of his or her independence, neutrality and proven expertise.
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> 112 I do not consider these criteria to be vague or uncertain. The practice of labour relations in this country has developed into a highly sophisticated business. The livelihood of a significant group of professional labour arbitrators depends on their recognized ability to fulfill these criteria. Some of them not only enjoy national reputations for their skills in resolving industrial conflicts but are retired judges. From the Minister's perspective, there exists not only a large pool of recognized candidates, but the *HLDAA* allows generous latitude to his selection (i.e., a candidate "who is, in the opinion of the Minister, qualified"). The result is a perfectly manageable framework within which the legislature intended to give the Minister broad but not unlimited scope within which to make appointments in furtherance of the *HLDAA*'s object and purposes.

[38] The general principles outlined above by the Supreme Court of Canada apply with equal force in the case of a final offer arbitration process under the special Act. Let us recall that, in CUPE, the appointment of retired judges as chairpersons of interest arbitration boards was problematic even though two arbitrators respectively designated by the union and the employer

already sat on those arbitration boards. Consequently, they did have some institutional expertise. What is more, in this case, the assignment the final offer arbitrator will have to carry out on his or her own will be even more perilous and risky. Indeed, the arbitrator will not be called to arbitrate a dispute, but to choose a final offer—consisting of a global package—based on a set of technical, possibly differing elements stemming from section 10 or listed in section 11 of the special Act.

[39] It should be pointed out that, in the context of the traditional interest arbitration process, compromise possibilities are not eliminated and the concept of equity is not completely excluded. However, final offer arbitration leads to one-sided law-making. As a result of the special Act, we are dealing with a judicialized labour dispute where the operation of the usual balance of power no longer guides the final offers that will be presented by both parties. It is the prevailing party, as designated by the final offer arbitrator, that will dictate to the unsuccessful party, for the next three years (and perhaps retroactively) the working conditions of postal workers and the limitations, if any, to the employer's management rights (subsection 11(4) and section 14 of the special Act). Therefore, the weight of responsibility is enormous. This is a high-wire act, probably more political than legal, because this case is concerned with legitimacy, and not legality.

[40] In the end, in the arbitrator's decision, which will immediately become binding, the final offer arbitrator will have to convince the unsuccessful party that the final offer presented by the prevailing party is ultimately more reasonable given the constraints and the criteria dictated to him or her by Parliament, in this case, section 11 of the special Act, political determinism oblige. Thus, it will be easy to turn the final offer arbitrator into a scapegoat. The rhetoric of labour relations will invariably link the prevailing party to its messenger. This can only be detrimental to the company,

the workers and the government itself. In this case, if the arbitrator's appointment is deemed problematic for or unacceptable to the unsuccessful party right from the outset, this will completely undermine confidence in this extraordinary process for determining working conditions. Caution is required to avoid the deterioration of the labour relations environment for years to come.

[41] In that regard, the evidence provided by the union and the labour relations history between both parties to the collective agreement confirm that the grievance or interest arbitrators previously designated by the parties or appointed by the Minister or her predecessors all had a certain relevant relative expertise in matters of labour relations. Their acceptability in the field of labour relations was not disputed. The same can be said of their language skills in instances when the hearing of a case required the testimony of witnesses and oral submissions in both official languages, which brings us to the last point raised by the union.

Bilingualism at the Canada Post Corporation

[42] The evidence on record does not support the respondent's allegation that the union has waived any quasi-constitutional right arising out of the *Official Languages Act*, RSC, 1985, c 31 (4th Supp) (OLA), but I do not need to opine on whether or not the final offer arbitrator constitutes a "federal court" within the meaning of the OLA.

[43] Indeed, even if I assume, for the purposes herein, that OLA provisions do not apply to final offer arbitrators, the Minister's decision to not appoint a bilingual individual is still unreasonable in this case.

[44] We must bear in mind that the employer is a crown corporation subject to the obligations imposed by the OLA and that the working languages of its employees are English and French, which have equal status under the OLA. Moreover, the postal workers' collective agreement states that both the English and French versions shall be regarded as official.

[45] Since the special Act calls directly for a careful review by the final offer arbitrator of the official provisions of the collective agreement currently in effect in light of the final offers that could potentially significantly amend the current texts, it is inconceivable in this case that the Minister would appoint someone who is not bilingual.

[46] I think that the final offer arbitrator must be capable of reading the collective agreement and the final offers in both official languages. Finally, forcing one of the parties to the collective agreement, its representatives and its witnesses to proceed with or testify at the hearing in the other official language against their will is not only unfair and prejudicial, but in the end, could give the Court reason to quash the final decision rendered by the final offer arbitrator appointed by the Minister.

Conclusion

[47] In conclusion, this is not a matter of imposing a particular individual on the Minister. However, the decision rendered by the Minister on July 22, 2011, is unreasonable and must be quashed by the Court. This seems to be the only possible remedy given the problems already raised by the parties, who do not agree on the effects of Judge Osborne's resignation.

[48] As of the date of this ruling, the parties have not advised the Court of the appointment of a new final offer arbitrator whose selection by the Minister would be mutually acceptable to the parties to the collective agreement.

[49] Consequently, the Minister is requested to take these grounds into consideration and ensure that the person selected have a certain degree of recognized labour relations experience and be bilingual before appointing the new final offer arbitrator.

[50] Giving these findings, the union is entitled to costs throughout against the respondent. Since the employer has not taken a position on the merits of the application for judicial review, but has only challenged the motion for an injunction and a stay of proceedings, the costs against the employer shall be limited to that motion.

JUDGMENT

THE COURT ORDERS AND ADJUDGES:

1. The respondent's motion for dismissal is dismissed and the union's application for judicial review is allowed in part;

2. The application to declare inoperable or strike down section 12 of the special Act is dismissed;

3. The Minister's decision dated July 22, 2011, to appoint the Honourable Coulter A. Osborne is quashed;

4. Before appointing a new final offer arbitrator, the Minister shall take into account the grounds of the Court's decision and ensure that the person selected has, namely, some degree of recognized labour relations experience and is bilingual;

5. The union is entitled to all costs against the Attorney General of Canada. The union is entitled to costs against the employer in respect of the motion for an injunction and a stay of proceedings only.

"Luc Martineau"

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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