Federal Court  Cour fédérale

Date: 20120412

Docket: T-612-11

Citation: 2012 FC 419

Ottawa, Ontario, April 12, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

CANADA POST CORPORATION

and

CANADIAN UNION OF POSTAL WORKERS

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of a decision by an Occupational Health and Safety Tribunal Canada Appeals Officer who upheld a direction by a Health and Safety Officer that the applicant is in contravention of the *Canada Labour Code*, RSC, 1985, c L-2. For the reasons that follow, the application is dismissed.

Facts

[2] The facts in this case are straight-forward. In 2004, through negotiations by their bargaining agent, the Canadian Union of Post Workers (CUPW), Rural and Suburban Mail Carriers

(RSMCs) became employees of the Canada Post Corporation (CPC). Prior to this collective agreement, RSMCs were under contract to CPC and therefore not employees of CPC. Until they became CPC employees, the RSMCs were precluded from forming a trade union pursuant to the provisions of the *Canada Post Corporation Act*, RSC, 1985, c C-10) (CPC Act) and the *Canada Labour Code*, RSC, 1985, c L-2 (Code).

[3] In March 2009, CUPW took the position that CPC was in contravention of s.134.1(3)(a) of the Code, in that it had formed more than one committee in respect of its employee-employer policy committee without the agreement of the RSMCs, as represented by CUPW. Stated another way, CUPW was of the position that the RSMCs were not considered a part of the Urban Postal Operations (UPO) National Joint Health and Safety Committee (UPO-NJHSC) by CPC and were represented by another separate committee.

[4] Following an investigation, and his attendance at a Rural and Suburban Mail Carriers-National Joint Health and Safety Committee (RSMC-NJHSC) meeting, a direction was issued by Bruce McKeigan, Health and Safety Officer (HSO). The HSO determined that CPC was in contravention of the Code, as contended by CUPW. The HSO wrote in his December 17, 2009 direction: "The employer has established more than one policy committee without the agreement of the trade union." The direction instructed CPC to terminate the contravention by January 15, 2010.

[5] The HSO's direction was appealed to the Occupational Health and Safety Tribunal Canada by CPC on January 14, 2010 and affirmed in a decision by Michael Wiwchar, Appeals Officer (Appeals Officer) on March 15, 2011. On February 18, 2010 a stay of the direction was issued until

a decision on the merits of the appeal was taken. The applicant, CPC, seeks, in this Court, judicial review of the Appeals Officer's decision rendered on March 15, 2011.

Standard of Review and Issue

[6] The applicant has presented two issues to the Court in this judicial review application:

a. Did the Appeals Officer err in law by giving an interpretation to section 134.1 of the Code that it cannot reasonably bear?

b. Did the Appeals Officer fail to observe a principle of procedural fairness that he was required observe?

[7] Counsel for both the applicant and respondent agreed that *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 has made it clear that reasonableness is the appropriate standard of review to be applied with respect to mixed question of fact and law and that correctness is the appropriate standard of review to be applied with respect to questions of law arising out of administrative decisions.

[8] The second issue in this case, however, ordinarily attracts a correctness standard of review as procedural fairness questions are questions of law.

[9] The issue in this case, therefore, is whether the decision by the Appeals Officer affirming the direction of the HSO that the employer, CPC, had established more than one policy committee without the agreement of the trade union, in contravention of section 134.1(3)(a), can withstand scrutiny under a reasonableness standard of review. I find that it can withstand such scrutiny.

[10] Turning to the second issue, the applicant contends that the Appeals Officer breached the principles of procedural fairness by violating the rule in *Browne v Dunn* ((1893), 6 R. 67 (HL)).

[11] I shall address each of the applicant's issues in turn. I find the Appeals Officer's decision to be reasonable on the basis of the first issue and I find no breach of procedural fairness with respect to the conduct of the hearing.

Analysis

The Appeals Officer did not err in law with his interpretation of section 134.1 of the Code and finding that no agreement had been reached

[12] The applicant argues that the Appeals Officer erred by giving an interpretation to section 134.1 of the Code that it cannot reasonably bear. Section 134.1(3)(a) of the Code provides as follows:

134.1 (1) For the purposes of addressing health and safety matters that apply to the work, undertaking or business of an employer, every employer who normally employs directly three hundred or more employees shall establish a policy health and safety committee and, subject to section 135.1, select and appoint its members.	134.1 (1) L'employeur qui compte habituellement trois cents employés directs ou plus constitue un comité d'orientation chargé d'examiner les questions qui concernent l'entreprise de l'employeur en matière de santé et de sécurité; il en choisit et nomme les membres sous réserve de l'article 135.1.
[…]	[…]
(3) An employer may establish more than one policy committee with the agreement of	(3) L'employeur peut constituer plusieurs comités d'orientation avec l'accord :
(a) the trade union, if any, representing the employees; and	a) d'une part, de tout syndicat représentant les employés visés;
(b) the employees, in the case of employees not represented by a trade union.	b) d'autre part, des employés visés qui ne sont pas représentés par un syndicat.

[13] As described and generally accepted by the Appeals Officer, the HSO made the following key findings:

a. The term "agreement" referred to in s. 134.1(3) of the Code may take different forms and is not restricted to a collective bargaining agreement;

b. No other agreement between the parties was presented to the HSO; therefore the HSO referred to the collective bargaining agreement between CPC and the UPO employee group represented by CUPW;

c. The existence of two separate collective bargaining agreements, was not, in and of itself, evidence of an agreement between the parties to establish a separate policy committee. The RMSC employee group collective bargaining agreement did not contain provisions for the establishment of either a separate policy committee as CPC negotiated in collective bargaining agreements with three other employee groups, nor did it include provisions for the establishment of separate work place (local) health and safety committees or representatives; and

d. Finally, there was no evidence of an agreement by CUPW through documents or *viva voce* evidence, to establish more that one policy committee.

[14] The Appeals Officer's finding reflected that of the HSO. He affirmed the HSO's direction on the appeal:

> …I find from the evidence presented to me that CPC violated para. 134.l(3)(a) of the Code when they established the RSMC-NJHSC for the RSMC employee group without obtaining the agreement of their trade union, CUPW.

> …I confirm the direction issued by HSO McKeigan on December 17, 2009. The employer will now have until April 15, 2011, to comply with the direction.

[15] The Appeals Officer continued:

> The Code under s. 134.1 does not require that any agreement that is reached between the employer and the trade union be reduced to writing or be included in a collective agreement. The collective agreement for the RSMC employee group does not specifically reference the establishment of two distinct policy committees.
>
> The interpretation of the word "agreement" in s. 134.1(3) is vital to this issue however it is not defined in the Code. As a result, I will use a common dictionary definition of the word which reads as follows:
>
> > Agreement: 1. the act of agreeing; the holding of the same opinion (reached agreement) 2. mutual understanding 3. an agreement between parties as to a course of action etc. b a document outlining such an agreement. 4. the condition of having the same number, gender, case, person. 5. a state of being harmonious.
>
> The above definition of the term "agreement" indicates clearly that it is not limited to something written. There are other aspects within the definition that obviously could demonstrate an agreement between the parties. Since there was no express written agreement in the present case, I will take other requisites of the definition into consideration.
>
> Therefore, I will determine whether or not the parties exhibited the following aspects of the term's definition, notably, did they:
>
> > a) hold the same opinion?; and
> > b) mutually understand each other?
>
> …the new RSMC collective agreement, under article 24 addressed the issue of health and safety committees but not the issue of a policy committee. The entire realm of health and safety was covered in four short paragraphs within the collective agreement. The first paragraph is all encompassing stating that the provisions of the Code shall apply to employees. What follows is wording about health and safety committees but nothing about the establishment of a policy or a national committee for this employee group.

> It is clear to me that the negotiations in 2003 were very intense and that the negotiators had a huge mandate to undertake under extreme time restraints. I'm convinced that the parties did not see eye to eye regarding the issue of establishing a policy committee these employees. Given the importance of entering into that "first" collective agreement versus one article about a policy committee, I can understand that only items that were crystal clear were explicitly written into the agreement at that time.
>
> Consequently, I find that the omission of an article similar to the one in the UPO collective agreement about policy or national committees was indicative of a clear gap on the issue between the lead negotiators. An opportunity for precise and unambiguous commitment on the issue existed but, for whatever reason, it was not spelled out. It is apparent to me that CPC and CUPW did not have the same opinion nor did they come to a mutual understanding on the issue of the establishment of a policy committee for the RSMC employee group. What transpired is that the employer and the trade union agreed to disagree.
>
> [Emphasis in Appeal Officer's decision].

[16] No quarrel can be taken with respect to the Appeals Officer's approach to the ambit of the word "agreement" in section 134.1 of the Code, or as to the evidentiary criteria of factors that might confirm or deny its existence. This is squarely within the scope of specialized experts, and thus attracts a standard of reasonableness, even though it is a statutory provision: *Smith v Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 SCR 160.

[17] The respondent's point is that more than one policy committee existed before the RSMCs were admitted into CPC as employees, and that a *separate* policy committee has been established for them once they became CPC employees. Despite the fact that the respondent points to evidence that shows these multiple committees were in existence, it must be clear and obvious from the evidence that a separate committee had been established for the RMSCs by agreement.

[18] The applicant nevertheless argues that the RMSCs were part of a "general" policy committee. The only evidence that such a "general" policy committee existed was, in the words of the Appeals Officer, suggested by CPC's counsel, not by CPC itself. The Appeals Officer found that the RSMC-NJHSC which HSO McKeigan met with on June 3, 2009 could not be mistaken for a "general" policy committee. These are findings of fact which this Court will not disturb.

[19] It therefore appeared to the two levels of decision-makers below that CPC had organized a number of policy committees sometimes in direct and sometimes not in direct proportion to the number of bargaining agents. On this point, I am in agreement with the respondent who argues:

> While Canada Post appears to be critical of the fact that its policy committees are effectively organized by bargaining agent affiliation, this structure is not the result of Mr Wiwchar's interpretation, but rather the result of Canada Post's historical approach to the organization of its policy committees. As found by Mr. Wiwchar, Canada Post did not maintain a "general" policy committee, and had established four (4) policy committees, each organized by bargaining agent, before the RSMCs attained employee status.
>
> [Emphasis added]

[20] On this first issue, I therefore find that the Appeals Officer's finding that the applicant, CPC, established a policy committee without the agreement of CUPW, as a mixed question of fact and law, reasonable.

The Appeals Officer did not fail to observe a principle of procedural fairness

[21] The applicant also takes issue with the following finding of the Appeals Officer cited earlier in these reasons:

> It is clear to me that the negotiations in 2003 were very intense and that the negotiators had a huge mandate to undertake under extreme time restraints. I'm convinced that the parties did not see eye to eye

> regarding the issue of establishing a policy committee these employees. Given the importance of entering into that "first" collective agreement versus one article about a policy committee, I can understand that only items that were crystal clear were explicitly written into the agreement at that time.
>
> Consequently, I find that the omission of an article similar to the one in the UPO collective agreement about policy or national committees was indicative of a clear gap on the issue between the lead negotiators. An opportunity for precise and unambiguous commitment on the issue existed but, for whatever reason, it was not spelled out. It is apparent to me that CPC and CUPW did not have the same opinion nor did they come to a mutual understanding on the issue of the establishment of a policy committee for the RSMC employee group. What transpired is that the employer and the trade union agreed to disagree.

[22] The applicant argues that the Appeals Officer violated the rule in *Brown v Dunne* when he allowed the testimony of a CPC witness to be "impeached" by the testimony of a CUPW witness.

[23] The applicant called Mr. Steve Matjanec, General Manager, and who was, at the time of the appeal, Senior Lead for the delivery for the Postal Transformation Project for Canada Post as a witness. The respondent called Mr. George Floresco, 3rd National Vice President of CUPW and the trade union's chief negotiator for the first RSMC employee group's collective agreement, and Ms Gayle Bossenberry, 1st National Vice President of CUPW, and national health and safety representative.

[24] Mr. Matjanec testified, in the words of the Appeals Officer, that "on the outcome of the segment of the negotiations with CUPW on the matter of combining the UPO and RSMC into a single policy committee, [the] position he communicated throughout the negotiations was that the

RSMC employee group was distinct, and required specific terms and conditions of employment [and] gave evidence about CPC's other policy committees."

[25] Counsel for the applicant argued that the evidence given by Mr. Floresco, CUPW's witness, which contradicted the testimony of the CPC witness, was "vague at best" and, on the key point of whether the RSMCs as represented by CUPW, had backed away from their position of including the RSMC employee group in an all encompassing bargaining unit.

[26] The applicant raises two objections to the Appeals Officer's decision to allow Mr. Floresco to testify on these matters:

> Counsel for CUPW did not cross-examine Mr. Matjanec on [whether the negotiations between the parties had yielded an agreement], nor did he advise Mr. Matjanec that a witness for the Union, George Floresco, Third National Vice President of CUPW and Lead Negotiator for CUPW, would challenge his assertions on [this topic].
>
> When called to give evidence by CUPW, Mr. Floresco testified that policy health and safety committee(s) had not been discussed by the parties at all.
>
> Canada Post objected to Mr. Floresco's testimony on the basis that counsel for CUPW had violated the Rule in *Browne and Dunn* when he deprived Mr. Matjanec of the opportunity to clarify his own evidence or specifically comment on the anticipated evidence of Mr. Floresco with respect to policy committee structure.

[27] The respondent argues that application of the rule is discretionary and in this particular case: counsel for CUPW clearly put the contradictory evidence before Canada Post's witness, Mr. Matjanec; the evidence at issue was not "on an essential matter"; and, it was obvious from the nature of the case that the evidence was disputed.

[28] There are four reasons why the applicant's argument on a breach of the rule in *Browne v Dunne* fails. First, there is no doubt that the question of whether or not there was an agreement was essential, if not the essential matter. Secondly, Mr. Matjanec's credibility was not being "impeached" by documentary evidence introduced via a subsequent witness (a procedure which would have offended the rule).

[29] The fact of the matter is that the Appeals Officer wrote in his decision:

> I find that Messrs Matjanec and Floresco's contradictory testimonies relating to their recollections and intentions surrounding the discussions that took place prior to the reaching of the collective agreement will not assist me in deciding whether or not an agreement was reached and as such will not impact my decision. Therefore, I do not need to address the admissibility issue regarding their evidence because it will not be given any weight.
>
> [Emphasis added]

[30] Thus, even if it can be said that the rule in *Brown v Dunne* had been violated in the present case, the Appeals Officer clearly stated that this testimony would not be given any weight.

[31] Third, the general statements of the Appeals officer that CPC and CUPW did not "see eye to eye," did not have a "mutual understanding," did not "did not have the same opinion," and that there was a "clear gap" between them, and that they "agreed to disagree" are all findings of fact clearly open to the Appeals Officer, none of which were affected by the *Browne v Dunne* rule. The Officer, reasonably, noted that when agreement is reached in this type of forum, it is habitually memorialized.

[32] Fourth, the fact that a subsequent witness provides contradictory oral testimony does not in and of itself trigger the *Brown v Dunne* rule. Even if it did, the Federal Court of Appeal held in *Green v Canada (Treasury Board - Transport Canada)*, 2000 CarswellNat 488, 50 CCEL (2d) 19, 254 NR 48, 179 FTR 318 at paras. 25-32:

> *Browne v Dunn* stands for a rule of evidence that where the credibility of a witness is to be impeached by evidence that contradicts his testimony, the witness must be given a fair opportunity to explain the discrepancy. This is a rule grounded in fairness and reason. Its application depends upon the circumstances of the case. The trier of fact is always entitled to disbelieve or reject any evidence that is presented….

[33] Here, the two individuals testified as to what transpired at the meetings between labour and management. Findings of fact were made. A review of the examinations and cross-examinations of both witnesses indicates that there was no doubt that what was in issue was what transpired at the meeting. The examinations were wide-ranging. No one can be said to have taken by surprise.

[34] For the foregoing reasons, the application is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. The respondent shall have its costs.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-612-11
STYLE OF CAUSE:	CANADA POST CORPORATION v CANADIAN UNION OF POSTAL WORKERS
PLACE OF HEARING:	Ottawa
DATE OF HEARING:	February 20, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	RENNIE J.
DATED:	April 12, 2012

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