Federal Court  Cour fédérale

Date: 20130506

Docket: T-627-12

Citation: 2013 FC 474

Ottawa, Ontario, May 6, 2013

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

BLAINE BELLEAU

Applicant

and

GARDEN RIVER FIRST NATION
CHIEF AND COUNCIL

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a resolution of the Chief and Council of the Garden River First Nation on February 28, 2012. By that resolution the Band adopted a severance pay policy for full-time employees in respect of their employment prior to 1997. The applicant contends that this decision effectively deprived him of severance pay of two weeks pay for each year of service from 1976 until his retirement in 2011. The applicant further contends that this

decision was made in breach of the principles of procedural fairness and ought to be set aside. For the reasons that follow this application is dismissed.

Background

[2] The applicant has been a full-time employee with the respondent Band since December of 1976. There is no employment contract. In 1997 the Band registered a mandatory pension plan for its employees. Prior to that date there was only a non-registered, optional plan with minimal and intermittent contributions.

[3] In 2004, the Chief and Council passed a motion to offer "a **one time** retirement incentive" (emphasis in the original) of two weeks pay for every year of employment to reduce the Band's deficit. The offer was open for 90 days and limited to employees with ten years service. The motion indicated that up to 10 employees would be in a position to accept the offer. The applicant was a member of the Council at that time and supported the motion.

[4] Early retirement incentives were again offered in 2006 and 2010. The 2006 offer was open for 30 days and was also limited to employees with ten years service. The 2010 retirement incentive was offered to eight employees with five years service and was open for 3 days. The latter motion stated that, "Failure to provide written agreement by October 15th, 2010 will make this offer null and void." Again, the applicant supported both motions in his capacity as a councillor.

[5] On October 20, 2011, the applicant gave notice of his intention to resign, effective November 4, 2011. He expected that he would receive two weeks pay for each year of his employment since 1976 in accordance with what he contends other employees had received and

consistent with the 2004, 2006 and 2010 packages. He was disappointed when this was not forthcoming.

[6] On November 23, 2010, the Chief and Council adopted a Human Resources and Procedures Policy (the HRPP). The HRPP provided for the creation of a Human Resources and Appeals Committee to review issues and make recommendations with respect to all aspects of the employment relationship to the Chief and Council, including compensation. The HRPP also established procedures for hearing submissions of interested parties and a right of appeal to Council. The applicant was a councillor at this time as well and signed the motion.

[7] The HRPP also addressed transition to retirement, allowing employees to work half-time for two years prior to retirement. The HRPP makes no provision for severance pay, an omission which the applicant contends effectively eliminated an existing entitlement to two weeks severance pay per year of service.

[8] In accordance with the HRPP, the Band administration advised the applicant to take his concern to the Human Resources and Appeals Committee. The applicant attended the hearing on January 18, 2012 and made his presentation. He concedes that it was a full and fair hearing.

[9] The Committee determined that there was no current severance or post-employment benefits plan in place (other than the registered pension) and therefore no authority to pay him severance pay. Nevertheless the Committee determined, based on his representations, that there was a *lacunae* in respect of pre-1997 employment. The Committee decided that it would recommend a policy be

established to benefit the applicant and others who began their employment prior to 1997, as they had neither severance pay nor pensionable service for those years.

[10] On January 19, 2011, the day following the Appeals Committee hearing, the Committee Chairperson wrote the applicant a letter informing the applicant that the Committee would recommend to Chief and Council a policy which would provide two weeks pay for every year of service prior to the registration of the pension plan, entitling the applicant to approximately 42 weeks at his current rate of pay. The policy would be retroactive to November 1, 2011 in order to make it applicable to the applicant, having resigned effective November 4, 2011. The letter stated that if the applicant did not accept this he could, pursuant to the procedure set forth in the HRPP, appeal to the Chief and Council.

[11] On January 23, 2011, the applicant wrote a letter to the Committee asking that the Committee process the decision to provide two weeks pay for every year of service prior to the 1997 pension plan, entitling him to 42 weeks pay.

[12] The applicant states in his affidavit that he "did not disagree" with the Committee's decision that without a change in policy it was obligated to deny him the severance payment he expected. Therefore he did not appeal the Committee's decision to the Chief and Council nor did he participate in Council's consideration of the Committee recommendation.

[13] On February 28, 2012 at the Band Council meeting, the Chief and Council accepted the Committee's recommendation to offer severance pay for full-time employees who met certain

criteria and had been continuously employed since before 1997. Those employees would be entitled to two weeks pay at their current rate for every continuous year of service prior to 1997. This policy also required that employees sign a full and final release upon payment.

[14] In a letter dated March 21, 2012, the Band administration informed the applicant that the new retirement policy had been approved by the Chief and Council and that he was entitled to payment for the equivalent of 38 weeks. However, as he had chosen not to sign the release form, the Band would not release the cheque. The applicant was advised that he could receive the cheque if he signed the release.

[15] The decision of Chief and Council is in contrast with the early retirement incentives from 2004, 2006 and 2010 which provided two weeks pay for *every* year of service up to retirement. It is for this reason that the applicant considers himself to be aggrieved by the procedure. He contends that the decision to limit severance to the years of service prior to 1997 breached both his rights to procedural fairness and was inconsistent with the existing policy reflected in the early-retirement incentives.

Issue

[16] A Band council must provide procedural fairness to those whose rights or interests are directly affected by its decisions. Therefore, there are two issues for this judicial review: whether the impugned motion affects the applicant's pre-existing terms and conditions of employment, and if so, whether the applicant was afforded procedural fairness.

Discussion

[17] The applicant contends that the decision of the Chief and Council on February 28, 2012 eliminated a pre-existing entitlement to severance pay for every year of service. This is at the core of his application. The applicant says that the decision of the Council on February 28, 2012 amounted to a unilateral amendment to the terms and conditions of employment, and that it was made without regard to procedural fairness.

[18] The applicant expected to receive the same retirement package that had been offered to other employees who began work before 1997. He contends that the 2004, 2006 and 2010 severance policies are reflective of the existing policy or terms and conditions of employment. However, the evidence demonstrates that there was no general policy of providing the equivalent of two weeks pay for every year of service upon an employee's retirement.

[19] The evidence was in fact to the contrary. The prior offers of severance pay do not have the characteristics of a long-standing policy of the Band. Each of the three prior early retirement incentives was time limited and targeted a discrete number of employees. The evidence indicates that the objective of each of the three motions in question was to address budgetary deficits in the Band's finances, and not to address transition to post-employment life, as does severance pay. Additionally, the 2004, 2006 and 2010 motions do not have the character of other instruments of Band policy, such as the HRPP or the February 28, 2012 decision, which, in contrast, are not time limited, are generic in their language and do not contemplate specific individuals. The 2004 motion

is described as a "one time" package; the 2006 motion was entitled "Early Retirement Incentive" and the 2010 motion was described as "Deficit Recovery – Exit Packages".

[20] There is no question that the applicant's retirement brought into focus the need for a policy to address post employment transition for individuals who were employees before the introduction of the pension plan in 1997. However, the applicant has failed to establish an evidentiary foundation for his claim. No policy has been identified, nor documents produced, which support the view that there was a policy, let alone a practice of paying severance for all employees for each year of service which could be said to be a policy. The sole evidence of a pre-existing policy is a vague reference to the applicant's sister having received two weeks salary for all years of employment.

[21] The evidence of Christine Whiskeychan, Finance Manager of the Garden River First Nation points, unequivocally, in the opposite direction. Ms. Whiskeychan states that it is "untrue" that each and every employee hired before 1997 automatically received severance pay and pension benefits for all years of service, including the years after 1997. Ms. Whiskeychan also describes the purpose of the 2004, 2006 and 2010 motions as being to address short-term financial challenges for the Band.

[22] In sum, the application fails on the foundational evidentiary question. Neither a policy nor practice to pay severance for all employees has been established. There is no documentary evidence which supports the assertion that the HRPP abolished a pre-existing entitlement to two weeks of severance pay for every year worked. This finding characterizes the nature and extent to which procedural fairness is required.

[23] In accordance with the established policy, the Band provided the applicant with a hearing before the Human Resources and Appeals Committee on January 18, 2012. The applicant accepts that this meeting was fair and that he had a full opportunity to participate. The Committee notified him that its recommendation would be brought to the Council and informed him of his right to appeal to the Council if he disagreed with the recommendation. He did not do so, indicating that he accepted the Committee's recommendation.

[24] It is important to note, therefore, that the applicant forwent the opportunity of appearing before Council and making representations.

[25] The focus of the Court's analysis where procedural fairness is engaged is not whether the decision is correct, but whether the procedure followed was fair in the circumstances and whether the outcome reasonable when situated in the legal and factual context: *Shotclose v Stoney First Nation*, 2011 FC 750; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339. As Justice Rothstein (now of the Supreme Court of Canada) said in *Sparvier v Cowessess Indian Band*, [1993] 3 FC 142, para 47:

> While I accept the importance of an autonomous process for electing band governments, in my opinion, minimum standards of natural justice or procedural fairness must be met. I fully recognize that the political movement of Aboriginal People taking more control over their lives should not be quickly interfered with by the courts. However, members of bands are individuals who, in my opinion, are entitled to due process and procedural fairness in procedures of tribunals that affect them. To the extent that this Court has jurisdiction, the principles of natural justice and procedural fairness are to be applied.

[26] In sum, as Justice Gauthier observed in *Orr v Fort McKay First Nation*, 2011 FC 37, it is a well entrenched proposition of law that these principles apply to administrative decisions of a band.

[27] The decision cannot be impugned on the basis of procedural fairness. The applicant received clear, consistent and complete notice of the hearings. He had two opportunities to make his case that he should receive two weeks pay for each year of service. He chose not to avail himself of the appeal to the Chief and Council, whose responsibility it was to make the final decision. There is no breach of procedural fairness. I find that the applicant received all that might be expected by way of notice and an opportunity to be heard.

[28] In assessing the reasonableness of the decision, Band decisions should be given deference: *News v Wahta Mohawks*, 2000 FCJ 637 and in this case, where the policy decision taken by the Band effectively granted benefits where none previously existed, it is very difficult to impugn the reasonableness of the policy. Moreover, the policy was made retroactive, so as to extend to the applicant.

[29] To conclude, I note that there is some discrepancy in calculating the applicant's entitlement under the new retirement policy. The Committee estimated that he would receive approximately 42 weeks pay, whereas he was ultimately offered 38 weeks. There is no evidence before this Court which could resolve this discrepancy. However, the calculation of the applicant's specific entitlement is not the matter under review. Should the parties wish the assistance of the Court in resolving this matter, they may contact the Registrar.

[30] The application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

Submissions on costs are due ten days from the date of this decision.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-627-12
STYLE OF CAUSE:	**BLAINE BELLEAU v GARDEN RIVER FIRST NATION CHIEF AND COUNCIL**
PLACE OF HEARING:	SAULT STE MARIE, Ontario
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REASONS FOR JUDGMENT AND JUDGMENT:	RENNIE J.
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APPEARANCES:

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Ms. Jennifer Tremblay-Hall	FOR THE RESPONDENT

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