



T-502-96

BETWEEN:

SYNDICAT DES JOURNALISTES DE RADIO-CANADA (CSN),

Applicant,

and

CANADIAN BROADCASTING CORPORATION,

Respondent.

REASONS FOR ORDER

NOËL J.

The Syndicat des journalistes de Radio-Canada (CSN) (the "Union") is seeking to have a decision of the Superintendent of Financial Institutions (the "Superintendent") dated February 2, 1996, upholding the decision excepting contract employees of the Canadian Broadcasting Corporation (the "CBC") from the CBC pension plan, set aside.

I THE FACTS

On November 21, 1994, the Union sent a request to the Superintendent asking him to include contract employees of the Corporation in the CBC pension plan. Contract employees perform services under term contracts and are assigned to current and public affairs programs, while "regular"¹ employees are hired for

¹ Terminology used by the applicant to refer to employees other than contract employees. Applicant's Memorandum of Fact and Law, paragraph 6, page 229 of the Applicant's Record.

indefinite periods and are assigned to the newsrooms. Regular employees are governed by Section I of the collective agreement between the CBC and its employees, while contract employees are governed by Section II of that agreement.²

On January 12, 1995, the Superintendent released his decision, which was that contract employees of the CBC are not eligible for the CBC pension plan. The text of that decision reads as follows:

[TRANSLATION]

We have examined your arguments and the documents attached to your letter in support of your position that contract employees may join the Canadian Broadcasting Corporation Pension Plan.

Subsection 14(1) of the *Pension Benefits Standards Act, 1985*, provides:

Each employee who is engaged to work on a full-time basis for an employer and is a member of a class of employees for which a pension plan is provided by that employer shall be eligible to become a member of that pension plan on and after: ...

The Corporation provides this plan for persons who are performing services on a full-time basis for the Corporation and who are employed in positions which are considered by it to be of a continuing nature, and who have been hired by the Corporation to perform such services for an indefinite period. It is also provided for persons who are employed in positions which are considered by the Corporation to be supernumerary or temporary or such other equivalent category established by the Corporation from time to time.

The pension plan is also provided for employees who perform services for the Corporation in positions in the temporary part-time category, the permanent part-time category or such other equivalent category established by the Corporation from time to time.

According to the Canadian Broadcasting Corporation, contract employees are considered to be employees who belong to a separate class of employees for which the Canadian Broadcasting Corporation pension plan is not provided.

Because the Act permits an employer to limit access to a pension plan to certain categories of employees, and also does not further define what a class of employees comprises, we believe that the provisions respecting eligibility for membership are consistent with the provisions of the Act.

Based on our understanding of this situation, the eligibility of contract employees for the Canadian Broadcasting Corporation Pension Plan should be determined by collective bargaining, and not by applying the Act.

²

Collective agreement signed by the Union and the CBC for the period from February 9, 1995 to September 17, 1995, Applicant's Record, page 144. The preamble to Section II of the collective agreement provides that that Section applies to contract employees of current and public affairs programs, while Article 1.02 of Section I provides that Section I applies to newsroom employees.

On May 18, 1995, the applicant Union asked the Superintendent to reconsider the refusal set out in his decision of January 12, 1995, and on February 2, 1996, the Superintendent rejected the request and upheld the decision, as follows:

[TRANSLATION]

According to section 14 of the Act, each employee who is a member of a class of employees for which a pension plan is provided by the employer shall be eligible to become a member of that pension plan on and after the day on which the employee completes twenty-four months of continuous employment with the employer. The position of the Office is that the Act allows an employer to provide a pension plan for certain class [*sic*] of employees and that contract employees of the Canadian Broadcasting Corporation do not belong to classes of employees for which the Canadian Broadcasting Corporation Pension Plan is provided.

II ISSUES

The only issue raised in this appeal is whether the Superintendent was entitled to conclude that contract employees were not eligible for membership in the pension plan under the provisions of Section 14 of the *Pension Benefits Standards Act, 1985*.³

III RELEVANT STATUTORY PROVISIONS

This appeal challenges the decision of the Superintendent, whose powers and duties are set out in Section 5 of the 1985 Act:

5. The Superintendent, under the directions of the Minister, has the control and supervision of the administration of this Act and, in relation thereto, has the following powers and duties:

- (a) to examine all pension plans that are filed for registration under this Act and all amendments to such pension plans that are filed pursuant to this Act;
- (b) to register and issue certificates of registration in respect of all pension plans that are filed for registration under this Act and comply with the standards for registration;

³

R.S.C. 1985, c. 32, (2nd Supp.), hereinafter the "1985 Act".

Accordingly, the Superintendent must ensure that pension plans that fall within his jurisdiction comply with the standards for registration. "Standards for registration" mean the provisions that a pension plan must contain in order for it to be registered. Section 13 provides:

13. The standards for registration of a pension plan are those set out in sections 9 and 14 to 28.

Section 14 provides for eligibility for membership by an employee in a pension plan. Section 14 of the 1985 Act, which reads as follows, is the central issue in this matter:

14.(1) Each employee who is engaged to work on a full-time basis for an employer and is a member of a class of employees for which a pension plan is provided by that employer shall be eligible to become a member of that pension plan on and after

(a) the day on which the employee completes twenty-four months of continuous employment with the employer, in the case of a pension plan other than a multi-employer pension plan; or

(b) in the case of a multi-employer pension plan, the day on which both the following requirements have been fulfilled, namely,

(i) twenty-four months have elapsed since the employee was first employed with a participating employer, and

(ii) the employee has earned, in respect of employment with the participating employers, at least thirty-five per cent of the Year's Maximum Pensionable Earnings in each of two consecutive calendar years after December 31, 1984, or has fulfilled an alternative requirement that, in the Superintendent's opinion, is reasonably equivalent.

(2) Notwithstanding subsection (1), a pension plan may provide, in respect of employees who are engaged to work on a full-time basis, that membership in the plan is compulsory, except for employees who, because of their religious beliefs, object to becoming members of the plan.

In addition, subsection 2(1) sets out the definitions used in the 1985 Act;

"full-time basis" is defined as follows:

"full-time basis", in relation to an employee of a particular class, means engaged to work, throughout the year, all or substantially all of the normally scheduled hours of work established for persons in that class of employees;

The concept of "continuous" is defined as follows:

"continuous", in relation to membership in a pension plan or to employment, means without regard to periods of temporary interruption of the membership or employment;

The definition of "included employment" provides:

"included employment" has the meaning assigned by section 4;

Section 4 provides the following definition of "included employment":

(4) In this Act, "included employment" means employment, other than excepted employment, on or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including, without restricting the generality of the foregoing,

- (a) any work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of a ship and transportation by ship anywhere in Canada;
- (b) any railway, canal, telegraph or other work or undertaking connecting a province with another province or extending beyond the limits of a province;
- (c) any line of steam or other ships connecting a province with another province or extending beyond the limits of a province;
- (d) any ferry between a province and another province or between a province and a country other than Canada;
- (e) any aerodrome, aircraft or line of air transportation;
- (f) any radio broadcasting station;
- (g) any bank;
- (h) any work, undertaking or business that, although wholly situated within a province, is before or after its execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more provinces; and
- (i) any work, undertaking or business outside the exclusive legislative authority of provincial legislatures, and any work, undertaking or business of a local or private nature in the Yukon Territory or the Northwest Territories.

(Emphasis added)

IV PLAN IN ISSUE

The pension plan in issue has been established by the CBC. All questions arising in the administration and interpretation of the plan are to be decided by the Pension Board established by the CBC.⁴ A person is eligible for membership in the plan if he or she is an employee as defined in Section 3(fb) of the plan:

"employee" means a person who is performing services on a full-time basis for the Corporation and is employed in:

- (i) a position which is considered by the Corporation to be of a continuing nature, and such person has been hired by the Corporation to perform such services for an indefinite period and shall be deemed to include any person appointed by the Governor-in-Council to serve full time as a director of the Corporation;
- (ii) a position which is considered by the Corporation to be supernumerary or temporary or such other equivalent category established by the Corporation from time to time.

⁴

Section 9(2) of the Pension Plan, Applicant's Record, page 78.

An employee shall be deemed to include a person who is on leave from the Corporation without payment of salary when such person was so classified as an employee immediately prior to being granted such leave.
(Emphasis added)

Accordingly, under the provisions of subparagraph (i), a person is eligible for membership in the plan where he or she has been hired by the CBC for an indefinite period. On this point, Section I of the collective agreement confirms that the pension plan applies to employees covered by that Section of the agreement,⁵ and gives the Union that represents them the right to be consulted in respect of any changes to the pension plan.⁶ Section II of the collective agreement is silent as to the plan in question and as to the eligibility of contract employees for membership in the plan.

V POSITION OF THE PARTIES

According to the Union, contract employees assigned to public affairs programs perform services that are similar, if not identical, to regular employees assigned to newsrooms. Accordingly, they belong to a class of employees for which a pension plan is provided by the employer, within the meaning of subsection 14(1) of the 1985 Act, and are eligible for membership in the pension plan.

The Union contends that the two groups of employees [TRANSLATION] "have the same collective agreement, for all practical purposes",⁷ in that:

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- ⁵ Under the heading "Retirement", Article 11.05 of the collective agreement provides:
Corporation regulations relating to retirement apply to employees of the bargaining unit.
The expression "bargaining unit" is defined "for the purposes of this Section of the Collective Agreement" as the Union. Accordingly, the right of the members of the bargaining unit covered by Section I to join the pension plan is confirmed by the collective agreement.
- ⁶ Article 11.07 of Section I of the collective agreement, Applicant's Record, page 185.
- ⁷ Applicant's Memorandum, paragraph 59(f), Applicant's Record, page 239.

[TRANSLATION]

- (i) contract employees are entitled to statutory holidays and annual vacation, as set out in chapter 8, pages 129 *et seq.*, of Section II of the collective agreement filed in the Applicant's Record (pp. 208 *et seq.*);
- (ii) contract employees are also entitled to benefits as a direct result of the collective agreement, such as maternity or paternity leave (chap. 8, pages 131 *et seq.*, Applicant's Record, p. 209), leave for family reasons (chap. 8, p. 132, Applicant's Record, p. 210), sabbatical leave (chap. 6, p. 125, Applicant's Record, p. 206), sick leave (chap. 8, pp. 136-137, Applicant's Record, p. 213);
- (iii) it also provides that contract employees may also be disciplined by their superiors (chap. 10, pp. 139-140, Applicant's record, pp. 214-215) and have access to a grievance procedure (chap. 11, pp. 141-142, Applicant's record, pp. 215-216);
- (iv) the collective agreement provides that the contracts of contract employees are renewable for so long as a program lasts (chap. 4, art. 4, pp. 118 *et seq.*, Applicant's Record, pp. 202 *et seq.*);
- (v) it should be added that the collective agreement provides for the transfer of supernumerary, full-time and contract employees without interruption of service (chap. 5, art. 5.05, p. 122, Applicant's Record, p. 204);
- (vi) there is a tacit mechanism for contract renewal, since a non-renewal procedure is set out in chapter 4, p. 120, Applicant's Record, p. 203);⁸

The Union further adds that the minimum requirements of subsection 14(1) of the 1985 Act have been met since the employees in question have performed services continuously for at least 24 months, as a result of the renewals of their respective contracts.

According to the CBC, on the other hand, the fact is that contract employees are hired for definite periods and accordingly are members of a separate class of employees from the class to which regular employees belong.

In this respect, the CBC makes the point that the application of Section II of the collective agreement is specifically limited to employees who are hired under contracts for a specific term.⁹ The pension plan is reserved for employees who are hired for indefinite periods.¹⁰ According to the CBC, this difference is

⁸ Applicant's memorandum, paragraph 37, Applicant's Record, page 235. [Page references for the collective agreement are to the English version of the collective agreement - Tr.]

⁹ Article 4.01 of the collective agreement, Applicant's Record, page 202.

¹⁰ Pension Plan, s. 3(fb).

the basis for the existence of a separate group of employees, and under subsection 14(1) of the 1985 Act it was entitled to make that distinction in order to identify the class of employees covered by its pension plan.

III ANALYSIS AND DECISION

It is common ground that contract employees are hired for fixed periods and that the pension plan is reserved, under the terms of that plan, for employees hired for indefinite periods. Accordingly, the only question that arises is whether the CBC was entitled to make this distinction, under the 1985 Act, in order to circumscribe eligibility for membership in its pension plan.

The Union is of the opinion that the CBC was not entitled to make this distinction. In its view, the CBC could not dictate access to its pension plan based on the conditions on which its employees are hired, and more precisely, based on whether the term of the employment relationship is fixed or indeterminate.

The Union is of the opinion that the purpose of the 1985 Act is to make an employee who performs services full-time and continuously for 24 months eligible for membership in a pension plan if such a plan is provided for employees who perform essentially the same services. The minimum standards in respect of the duration and continuity of employment are established by the 1985 Act. According to the Union, [TRANSLATION] "Neither the respondent nor the Office of the Superintendent may make the term of the work a class within the meaning of 14(1) of the 1985 Act ... [since] the term is a standard in itself which has already been established in paragraph 14(1)(a)."¹¹

¹¹ Applicant's Reply, paragraphs 4 and 5.

However, I note that the distinction made by the CBC is a distinction relating not to the length of the term of the contractual relationship, but rather to the nature of the relationship. A fixed term employment contract, regardless of how long the term, involves rights and obligations that are different from those on which a relationship with an indefinite term is based. What sets this type of contract apart is not the length of its term, but the fact that the term is fixed in advance and agreed between the parties.

In addition, as the Union has had to concede, the 1985 Act is silent as to the class of employees that the employer may select for the purposes of establishing a pension plan. Accordingly, any distinction that complies with the minimum standards established by the Act¹² and that differentiates between one group of employees and another may *prima facie* be used to circumscribe eligibility for membership in a pension plan.

In this respect, the distinct nature of term contracts has been acknowledged by each of the employees in question, since they have all agreed to sign a contract which provides for the specific conditions on which they are hired. The standard contract submitted by the Union in these proceedings specifies the term for which the employee is hired.¹³ It further provides that it has been entered into under Section II of the collective agreement, and states that that section is an integral part thereof. Section II provides that contracts are negotiated for a period from 13 to 52 weeks and that each contract shall specify the dates of hiring and termination.¹⁴

¹² In this instance, full-time employment with twenty-four months of continuous employment with the employer.

¹³ From June 18, 1994, to June 20, 1995, Applicant's Record, page 30.

¹⁴ Articles 4.02 and 4.05.1 of Section II of the collective agreement, Applicant's Record, page 202.

Section II of the collective agreement was negotiated by the Union and the CBC precisely to reflect the specific nature of the undertakings made by the CBC to its contract employees. The mere fact that it exists attests to the fact that the Union has acknowledged that the employees covered by that section comprise a separate group. In addition, a careful reading of the two sections of the collective agreement shows that they were negotiated as parallel agreements and that the Union tried to obtain for contract employees all the rights granted to regular employees.¹⁵ However, it is telling that eligibility for membership in the pension plan is not one of the rights that the Union succeeded in having included in Section II of the collective agreement. Since the wording of the pension plan itself limits the plan to employees hired for an indefinite period, and Section II of the collective agreement applies precisely to employees who are not hired for an indefinite period, the fact that Section II is silent on this point cannot be the result of an oversight. This necessarily represents the Union's acknowledgement of the fact that contract employees, unlike regular employees, are excepted from the class of employees for which the pension plan was set up.

As a result, for the purposes of the collective agreement, the Union has acknowledged the distinction made by the employer in establishing its pension plan. The same is true of each contract employee, since Section II of the collective agreement is an integral part of the contract that they have all signed.

It is therefore difficult for the Union to argue that the distinction made by the CBC is not meaningful or does not in fact exist. It may still argue that it is unlawful, but as I said earlier, the 1985 Act is silent as to the class of employees for which an employer may establish a pension plan and the criterion adopted in this instance offends neither of the minimum standards which it creates.

¹⁵ For example, see the rights cited by the Union in these proceedings and listed in note 9, *supra*.

Accordingly, the Superintendent was entitled to refuse to rule that contract employees are included in the CBC pension plan.

The application for judicial review is dismissed.

Marc Noël
Judge

Ottawa, Ontario
May 5, 1997

Certified true translation



C. Delon, LL.L.

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO: T-502-96

STYLE OF CAUSE: SYNDICAT DES JOURNALISTES DE RADIO-CANADA
v.
CANADIAN BROADCASTING CORPORATION

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: APRIL 29, 1997

REASONS FOR ORDER OF NOËL J. DATED MAY 5, 1997

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