Federal Court of Appeal | Cour d'appel fédérale

Date: 20170425

Docket: A-308-16

Citation: 2017 FCA 81

CORAM: **GAUTHIER J.A.**
BOIVIN J.A.
WOODS J.A.

BETWEEN:

BRIAN ALLEN, DAVID DUNCAN, JOLANTA MALGORZATA KANABUS-KAMINSKA, DAVID O'NEIL, DARWIN REED, and RESEARCH COUNCIL EMPLOYEES' ASSOCIATION

Applicants

And

NATIONAL RESEARCH COUNCIL OF CANADA

Respondent

Heard at Ottawa, Ontario, on April 25, 2017.
Judgment delivered from the Bench at Ottawa, Ontario, on April 25, 2017.

REASONS FOR JUDGMENT OF THE COURT BY: GAUTHIER J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20170425

Docket: A-308-16

Citation: 2017 FCA 81

CORAM: **GAUTHIER J.A.**
BOIVIN J.A.
WOODS J.A.

BETWEEN:

BRIAN ALLEN, DAVID DUNCAN,
JOLANTA MALGORZATA KANABUS-KAMINSKA,
DAVID O'NEIL, DARWIN REED, and
RESEARCH COUNCIL EMPLOYEES' ASSOCIATION

Applicants

And

NATIONAL RESEARCH COUNCIL OF CANADA

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on April 25, 2017).

GAUTHIER J.A.

[1] This is an application for judicial review of the decision (2016 PSLREB 76) of an adjudicator of the Public Service Labour Relations and Employment Board (the Board) dismissing various grievances filed by the applicants.

[2] The Research Council Employees' Association (RCEA) is a bargaining agent representing the majority of employees at the National Research Council of Canada (NRC). It filed a policy grievance in respect of a practice adopted by the NRC in computing the severance pay for layoff of employees in the Technical Category (To) Bargaining Unit.

[3] The five individual applicants were all members of the RCEA employed in the To Bargaining Unit until they were laid off by the NRC in 2013. Their individual grievances, which were heard by the adjudicator together with the RCEA's grievance, all concern the amount they said should have been payable to them upon their layoff under the collective agreement. These five claimants had all opted to cash out their accumulated severance (maximum 30 weeks) in accordance with article 56.10 (a) of the collective agreement at issue after the provisions dealing with severance pay for voluntary termination were eliminated from the collective agreement.

[4] The applicants raised two issues before us:

i. Whether the adjudicator's interpretation of the collective agreement was unreasonable; and

ii. Whether the adjudicator erred in failing to apply the doctrine of issue estoppel on the basis that the same issue had been determined by the Board in the context of a review of the Terms of Reference for an interest arbitration involving substantially the same parties in 2012 (2012 PSLRB 115).

[5] The parties disagree on the standard of review applicable to the second issue. We are of the view that the adjudicator's application of the common law doctrine of issue estoppel to the particular facts before him is reviewable on a standard of reasonableness (*Nor-Man Regional Health Authority v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, 2011 [2011] 3 S.C.R. 616 (*Nor-Man*); *Loewen v. Manitoba Teachers' Society*, 2015 MBCA 13).

[6] The adjudicator held that for the purpose of applying the cap (that is the maximum total benefits to which an employee is entitled) of 70 weeks set out in article 3.6.13.1 the Work Force Adjustment (WFA) Policy incorporated in the collective agreement (article 55.1), one must consider what an employee is entitled to under article 56.1.3, which specifically deals with this question in respect of layoffs. We understand from the reasons and its Appendix 1 that it is only after computing the effect of the cap on the maximum total benefits to which one is entitled under the WFA Policy, that article 56.7.1 comes into play to determine what is payable upon departure because of payments already made in respect of other severance benefits. For example, a payment in advance made to an employee who opted for cashing out under article 56.10(a) would reduce the amount payable with respect to the layoff to give effect to the said provision and to avoid pyramiding benefits.

[7] The applicants argued that there was a more appropriate way to construe article 3.6.13.1 of the WFA Policy that would give effect to all the relevant paragraphs of article 56 which deals with severance pay. More particularly they submit that on the plain meaning of article 56.7.1, the weeks of continuous work for which another severance benefit was paid to an employee pursuant to article 56.9 and 56.10(a) should be deducted from the maximum entitlement set out at article 56.1.3 before applying the 70-week cap provided at article 3.6.13.1 of the WFA Policy. This method would result in all the individual grievances before the adjudicator, in an increased amount to be paid compared to what the said employees would have received had they opted to receive a single payment pursuant to article 56.10(b) (all severance benefits to be paid upon departure).

[8] While it is evident that the reasons of the adjudicator could have been drafted more clearly, we are satisfied that upon reading the decision as a whole and in its context, it is sufficient to enable us to exercise our jurisdiction and to "connect the dots" (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board*, 2011 SCC 62, [2011] 3 SCR 708).

[9] The interpretation of a collective agreement is at the very core of an adjudicator's expertise. It may well be that the construction proposed by the applicants could have been adopted by the adjudicator or by this Court, but this is not the question before us. What must be determined is whether the interpretation adopted by the adjudicator is within the range of possible issues defensible on the law and the facts.

[10] We are satisfied that the adjudicator was alert and alive to all the arguments put forth by the applicants, including the weight and effect to be given to the 2012 decision of the Board. We have not been persuaded that the adjudicator made a reviewable error in construing the collective agreement that would justify our intervention. His conclusion was reasonable.

[11] With respect to the issue of issue estoppel, the parties agree that the adjudicator was not satisfied that in 2012, the Board had to construe the provisions in play before him, including particularly article 56.7.1. This is in fact why the NRC argued that it was not necessary for him to decide whether the 2012 decision was manifestly wrong. The applicants submit that the adjudicator erred in reaching this conclusion. We have not been convinced that the adjudicator's

decision not to apply issue estoppel was unreasonable in the circumstances of this case and in light of governing principles of labour arbitration in Canada (*Nor-Man*).

[12] In light of the foregoing, the application will be dismissed with costs.

"Johanne Gauthier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-308-16

APPEAL FROM A JUDICIAL REVIEW OF THE DECISION OF THE PUBLIC SERVICE LABOUR RELATIONS AND EMPLOYMENT BOARD, AUGUST 17, 2016, CITATION 2016 PSLREB 76

DOCKET:	A-308-16
STYLE OF CAUSE:	BRIAN ALLEN, DAVID DUNCAN, JOLANTA MALGORZATA KANABUS-KAMINSKA, DAVID O'NEIL, DARWIN REED, and RESEARCH COUNCIL EMPLOYEES' ASSOCIATION v. NATIONAL RESEARCH COUNCIL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	APRIL 25, 2017
REASONS FOR JUDGMENT OF THE COURT BY:	GAUTHIER J.A. BOIVIN J.A. WOODS J.A.
DELIVERED FROM THE BENCH BY:	GAUTHIER J.A.

APPEARANCES:

Christopher Rootham Karine Dion	FOR THE APPLICANTS
Michel Girard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nelligan O'Brien Payne LLP Ottawa, ON	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT