Date: 20090116

Docket: A-219-08

Citation: 2009 FCA 6

CORAM: **DESJARDINS J.A.**
LÉTOURNEAU J.A.
TRUDEL J.A.

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA
JEAN YVES DUHAIME, PAUL GRAVEL, CHRISTIAN LEROUX,
JACQUES LAFOND AND JOHN HICKEY

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on January 14, 2009.

Judgment delivered at Ottawa, Ontario, on January 16, 2009.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: DESJARDINS J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] This is an appeal against a decision of deputy judge Frenette of the Federal Court (judge) by which he dismissed the appellants' application for judicial review.

[2] The appellants raise the following five grounds of appeal:

a) whether the judge applied the proper standard of review;

b) whether he erred in finding that the Canadian Industrial Relations Board's (Board) decision was not determinative of the appellants' pension status under the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36 (PSSA) during the relevant period;

c) whether he erred in failing to overturn the decision of Public Works and Government Services Canada (PWGSC) regarding its determination of the appropriate legal test for employee status under the *Royal Canadian Mint Act*, R.S.C. 1985, c. R-9 (RCMA) and the PSSA;

d) whether he erred in finding that the decision rendered by an officer of PWGSC was reasonable; and

e) whether he erred in finding that there was no breach of procedural fairness.

[3] Despite the able arguments of counsel for the appellants, Mr. Andrew Raven, I have not been convinced that the learned judge committed an error which warrants or requires the intervention of this Court. I shall therefore address directly and succinctly each ground of appeal.

The Standard of Review

[4] Pursuant to a Memorandum of Understanding between the Public Service Service Alliance of Canada (PSAC) and PWGSC, a representative of PSAC requested that PWGSC recognize the

period within which the appellants were employed by an independent contractor (Pro-Fac) as "pensionable service" under the PSSA.

[5] Mrs. Boily, as a Policy and Legislation Officer of PWGSC (officer), concluded that the appellants were not "employees" of the Royal Canadian Mint (Mint) for the purposes of the PSSA.

[6] The judge found that the determination made by the officer required that she applied the definition of "employee" in sections 17 and 18 of the RCMA to the facts and circumstances governing the work accomplished by the appellants. This involved a mixed question of law and fact reviewable according to a standard of reasonableness: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 53; *Dynamex Canada Inc. v. Mamona*, 2003 FCA 248, at paragraph 45; *Estwick v. Canada (Attorney General)*, 2007 FC 894, at paragraph 80; *Cohen v. Canada (Attorney General)*, 2008 FC 676, at paragraphs 15 and 20. The judge made no error when he applied that standard to a review of PWGSC's decision.

Whether the Board's decision was determinative of the appellants' pension status during the relevant period

[7] Pursuant to applications by PSAC to have additional employees included in an existing bargaining unit in respect of employees of the Mint, the Board ruled that the appellants fell within the definition of "employee" for the purpose of the *Canada Labour Code* (Code) and, accordingly, were to be included in the bargaining unit.

[8] We agree with the judge that a determination of the appellants' employment status by the Board for the purposes of Part I – Industrial Relations of the Code does not entail a determination of their pension status for the purposes of the PSSA. While the Board possesses jurisdiction under Part I of the Code to proceed to the determination of bargaining units and the certification of bargaining agents and, in that context and for these purposes, to determine who is an "employee" pursuant to the wide definition of "employee" in section 3 of the Code, it does not possess the power to grant the appellants a pensionable status under the PSSA. Section 16 of the Code which gives the power to the Board to decide any question as to whether a person is an employer or an employee confers this power only for the purposes of Part I of the Code:

Powers of Board	Pouvoirs du Conseil
16. The Board has, in relation to any proceeding before it, power	**16.** Le Conseil peut, dans le cadre de toute affaire dont il connaît :
…	[…]
(*p*) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether (i) a person is an employer or an employee,	*p*) trancher, dans le cadre de la présente partie, toute question qui peut se poser à l'occasion de la procédure, et notamment déterminer : (i) si une personne est un employeur ou un employé,

[Emphasis added]

As the judge rightly pointed out, the Board in fact never discussed the pension status of the appellants under the PSSA nor granted them that status. Therefore, the matter could not be *res judicata* for PWGSC.

[9] Counsel for the appellants relies heavily on the decision of the Supreme Court of Canada in *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, upon which the Board also relied to conclude that the appellants were employees of the Mint. I think he is giving that decision a scope of application that it does not have and that both Chief Justice Lamer, who wrote for the majority of the Supreme Court, and the Board, never intended to give. At paragraphs 1, 48 and 61, the learned Chief Justice goes at length to remind the readers that the therein analysis of a tripartite relationship was made "in the collective labour relations context", "governed by the **Labour Code**", with regard "to provisions of the **Labour Code**" (words in bold in the original). Paragraph 13 of the Board's decision also makes it clear that the subject of its decision is restricted to determining whether the appellants should be included in the bargaining unit: see appeal book, at page 126.

[10] In *Estwick v. Canada (Attorney General)*, *supra*, Heneghan J. of the Federal Court found that a ruling of the Canada Revenue Agency that the applicants were employees under the *Public Service Employment Act*, R.S.C. 1985, c. P-33 was not determinative of their employment status under that legislation and did not replace the formal appointment process required by that legislation: see paragraph 92 of the decision. This is also true in our case as the ruling of the Board is not determinative of the appellants' pension status and does not replace the formal appointment process under sections 17 and 18 of the RCMA.

[11] I now turn to the appointment process of the employees of the Mint.

Whether PWGSC failed to apply the proper legal test to the determination of the appellants' status as employee and whether the judge was right in holding that the officer's decision was reasonable

[12] I see no merit in this contention of the appellants. Sections 17 and 18 of the RCMA confer upon the Mint the power to hire employees and to contract out for other work or services. Pursuant to section 17, the remuneration of employees of the Mint is "a charge against the revenues of the Mint". Once a person is an employee of the Mint, section 18 deems him or her "to be employed in the public service for the purposes of the PSSA". I reproduce both provisions:

Officers and employees	Recrutement
17. (1) The Mint may appoint such officers, agents and employees as are necessary for the proper conduct of the work of the Mint.	**17.** (1) La Monnaie peut nommer le personnel et les mandataires nécessaires à l'exercice de ses activités.
Remuneration	Rémunération
(2) The remuneration of officers, agents and employees of the Mint shall be a charge against the revenues of the Mint. R.S., c. R-8, s. 15.	(2) La rémunération du personnel et des mandataires de la Monnaie est imputée sur les recettes de l'établissement. S.R., ch. R-8, art. 15.
Master, officers and employees not part of federal public administration	Appartenance à l'administration publique fédérale
18. (1) The Master, officers and employees of the Mint are not part of the federal public administration but shall be deemed to be employed in the federal public administration for the purposes of the *Government Employees Compensation Act* and any regulations made pursuant to section 9 of the *Aeronautics Act*.	**18.** (1) Le personnel de la Monnaie — le président compris — est réputé faire partie de l'administration publique fédérale pour l'application de la *Loi sur l'indemnisation des agents de l'État* et des règlements pris en vertu de l'article 9 de la *Loi sur l'aéronautique*.
Master and employees deemed employed in public service	Appartenance à la fonction publique
(2) The Master, officers and employees of	(2) Le personnel de la Monnaie — le

the Mint shall be deemed to be employed in the public service for the purposes of the *Public Service Superannuation Act*, and the Mint shall be deemed to be a Public Service corporation for the purposes of that Act.	président compris — est réputé faire partie de la fonction publique pour l'application de la *Loi sur la pension de la fonction publique*. De même, la Monnaie est assimilée à un organisme de la fonction publique pour l'application de cette loi.
Contracting powers not limited by collective agreements	Intégrité du pouvoir de contracter
(3) No collective agreement entered into by the Mint with its employees pursuant to Part I of the Canada Labour Code shall prohibit or limit the power of the Mint to enter into contracts with any person to provide for the procurement by the Mint of any goods or services from that person or the minting of coins by that person.	(3) Les conventions collectives conclues entre l'établissement et son personnel sous le régime de la partie I du Code canadien du travail n'ont pas pour effet de porter atteinte au pouvoir de la Monnaie de passer des contrats pour la frappe de pièces ou la fourniture — à l'établissement — de marchandises ou services par le cocontractant.

[13] Section 17 defines an employee of the Mint as a person who has been appointed employee and whose remuneration is paid by the Mint as a charge against the revenues of the Mint. The appointment is certainly a statutory prerequisite which cannot be dispensed with or, as previously mentioned, replaced by a ruling of the Board: see *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, at paragraph 32.

[14] The issue that the officer of PWGSC had to determine was whether the appellants were employees of the Mint for the purposes of the PSSA. Contrary to the appellants' submissions that the officer decided that issue in the abstract on the basis of their employment contract with Pro-Fac and without regard for the reality, there was ample and cogent evidence for the officer and the judge to conclude that the appellants were not hired or remunerated by the Mint during the relevant period, but rather were hired and remunerated by Pro-Fac.

[15] The certificate which appears at pages 69 and 70 of the appeal book lists no less than 23 documents that were before the officer and considered by her in making her decision.

[16] At page 95, the Hire Information Form reveals without any ambiguity that, for example, appellant John Hickey was hired by Pro-Fac and was reporting to the Facility Manager who was also an employee of Pro-Fac.

[17] The Statement of Earnings and Deductions at page 98 shows that Mr. Hickey was paid by Pro-Fac and that Pro-Fac made the deductions for federal income tax and Canada Pension Plan.

[18] The appellants' status as employees of Pro-Fac is also evidenced, among other things, by articles 12.2 and 12.5 of the contract between Pro-Fac and the Mint. Article 12.2 reads:

> 12.2 All personnel assigned by the CONTRACTOR to fulfill the CONTRACTOR's obligations hereunder shall be and shall remain the employees of the CONTRACTOR who shall be responsible for the arrangement of substitutions, pay, supervision, discipline, unemployment insurance, Worker's compensation, leave and all other matters arising out of the relationship between employer and employee.
>
> [Emphasis added]

[19] Moreover, under article 12.5, the Mint was expressly prohibited from offering to employ or hiring any Pro-Fac employee during the relevant period without Pro-Fac's written consent. There was a hefty penalty to be paid by the Mint in case of a violation of that prohibition. As a matter of fact, it is only after the contract between Pro-Fac and the Mint expired that some of the Pro-Fac

employees were offered a position with the Mint. For example, a letter of offer was sent to Mr. Hickey confirming that he would be appointed employee of the Mint if he accepted the offer. The letter also gave him his position, classification and remuneration. It also informed him of the extensive benefits package that he would then enjoy, one of which being the benefit of the retirement pension plan.

[20] In any event, I agree with counsel for the respondent that, even if the common law test to determine the employment status of the appellants were to be applied in this case, it would be reasonable to conclude that the appellants were employees of Pro-Fac, not the Mint during the relevant period.

[21] The conclusion reached by the officer as to the employment status of the appellants for the purposes of the PSSA was found by the judge to be reasonable, that is to say, as he puts it at paragraph 28 of his reasons for judgment, a conclusion which falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and laws". On the basis of the evidence and the record, I cannot say that his conclusion is erroneous.

Whether there was a breach of procedural fairness

[22] This issue was not raised in the Notice of Application for judicial review nor in the affidavits in support of said application. It appeared for the first time in the memorandum of fact and law. The judge could have declined to deal with the issue, but he did not. He found that there was no

such breach. He was satisfied that the officer considered relevant evidence and provided sufficient reasons. I agree with this finding.

[23] I would add that the officer was not required to distinguish her finding from the Board's ruling because it was neither determinative nor critical to her analysis.

Conclusion

[24] For these reasons, I would dismiss the appeal with costs.

"Gilles Létourneau"
J.A.

"I concur
Alice Desjardins J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-219-08
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DATE OF HEARING:	January 14, 2009
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CONCURRED IN BY:	DESJARDINS J.A. TRUDEL J.A.
DATED:	January 16, 2009

APPEARANCES:

Andrew Raven Sandy Donaldson	FOR THE APPELLANTS
Anne Turley Lorne Ptack	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l. Ottawa, Ontario	FOR THE APPELLANTS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT