Cour d'appel fédérale

Federal Court of Appeal

CANADA

Date: 20090602

Docket: A-435-08

Citation: 2009 FCA 184

CORAM: **LÉTOURNEAU J.A.**
NADON J.A.
BLAIS J.A.

BETWEEN:

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Hearing held at Ottawa, Ontario, on June 2, 2009.

Judgment delivered from the Bench at Ottawa, Ontario, on June 2, 2009.

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

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on June 2, 2009)

LÉTOURNEAU J.A.

[1] In this case, the parties agree that the standard of review applicable to the decision of the member of the Public Service Labour Relations Board (*Professional Institute of the Public Service of Canada v. Canadian Food Inspection Agency*, 2008 PSLRB 50) is unreasonableness: see *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[2] Applying this standard, we are satisfied that this application for judicial review must be dismissed, for the following reasons.

[3] The board member ruled that the applicant's complaint filed under paragraph 190(1)(*b*) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 (Act) was inadmissible. Subjects of such complaints are alleged to have breached their duty to bargain in good faith.

[4] The board member's finding of inadmissibility is based on section 135 of the Act and the fact that the applicant used the dispute arbitration process under the Act. Section 135 of Division 9 of the Act, entitled Arbitration, reads as follows:

Division 9	Section 9
ARBITRATION	ARBITRAGE
Application of Division	*Application de la section*
Application	Application
135. This Division applies to the employer and the bargaining agent for a bargaining unit whenever	**135.** La présente section s'applique à l'employeur et à l'agent négociateur représentant une unité de négociation dans le cas où :
(*a*) the process for the resolution of a dispute applicable to the bargaining unit is arbitration; and	*a*) d'une part, le mode de règlement des différends applicable à l'unité de négociation est le renvoi à l'arbitrage;
(*b*) the parties have bargained in good faith with a view to entering into a collective agreement but are unable to reach agreement on a term or condition of employment that may be included in an arbitral award.	*b*) d'autre part, les parties ont négocié de bonne foi en vue de conclure une convention collective, mais n'ont pu s'entendre sur une condition d'emploi qui peut figurer dans une décision arbitrale.
(Emphasis added.)	

[5] As the board member pointed out, this section sets out the following cumulative conditions for the application of Division 9 of the Act. First, arbitration, the process for the resolution of a dispute, has been authorized; second, not just one, but both parties have bargained in good faith with a view to entering into a collective agreement.

[6] First of all, it was reasonable for the board member to infer and conclude pursuant to section 135 that, by using the arbitration process, the applicant had submitted or acknowledged that the Canadian Food Inspection Agency (Agency) had bargained in good faith during the current relevant period.

[7] Second of all, on the basis of that first conclusion, it was reasonable for and open to the board member to rule inadmissible the applicant's subsequent complaint alleging this time that the Agency had bargained in bad faith during the same period.

[8] In support of its arguments, the applicant relies on a subsequent decision involving the same parties and rendered by the same board member, in which he rejected an objection of the respondent that was similar to the one raised and allowed in this case: see *Professional Institute of the Public Service of Canada v. Canadian Food Inspection Agency*, 2008 PSLRB 78.

[9] In that case, the board member allowed a complaint based on paragraph 190(1)(*b*) of the Act alleging that the respondent had not made every reasonable effort to enter into a collective agreement even though, later, there was a resumption of bargaining, mediation and, lastly, a

request for arbitration. According to the applicant, that same board member's new ruling recognizes that the recourses under paragraph 190(1)(*b*) and subsection 135(*b*) of the Act are not inconsistent, thereby contradicting on this point his earlier decision, which is the subject of this application for judicial review.

[10] With respect, we are of the view that the applicant is giving the decision before us a scope that it does not have and that is disconnected from the facts underlying and justifying the decision.

[11] In addition, the applicant itself admits that, here, the fact situation differs from the one that prevailed in the board member's subsequent decision. Paragraph 9 of 2008 PSLRB 78 states the applicant's position on the issue as follows:

> [9] The complainant argues that the situation in 2008 PSLRB 50 is different from that of this case. When this complaint was filed, the complainant had not yet requested the establishment of an arbitration board. Furthermore, at the time of the hearing, an arbitration board had not yet been established. In 2008 PSLRB 50, the complainant had already applied for arbitration when it filed a complaint, and the arbitration board had issued its arbitral award when the complaint was heard.

[12] The board member accepted this submission of the applicant because the complaint made under paragraph 190(1)(*b*) had preceded the request for arbitration and referred to behaviour that differed from that which occurred after the bargaining resumed and that eventually led to the request for arbitration. The board member stated the following at paragraphs 18 to 20 of his decision:

> [18] In 2008 PSLRB 50, arbitration was requested four months before a bad-faith bargaining complaint was filed. Furthermore, an arbitration board had already been

> established by the Chairperson of the Board when the complaint was filed. Finally, when the complaint was heard, the arbitration board had rendered its arbitral award.
>
> [19] As argued by the complainant, the schedule of events differentiates this case from 2008 PSLRB 50. In that case, when the complaint was filed, the complainant had already requested arbitration. In this case, the request for arbitration was made several months after the complaint and the incidents that gave rise to it.
>
> [20] To decide on the objection, the Board needs to look at the situation as it was in October 2007, when the complaint was filed, and as it was on January 23, 2008, the date of the incident that is the subject of the amendment. At those times, the complainant had not yet requested arbitration. If the complaint had been heard before April 2008, this objection could not have been made.

[13] In other words, the two requests, that is, for punishment for the respondent's bad faith and for arbitration, covered two different periods of time that, owing to the respondent's behaviour, gave rise to the two remedies sought.

[14] However, that is not the case here. The applicant chose between two recourses that, under the circumstances, cannot both be exercised in the order in which the chosen recourse was pursued. In our opinion, the board member was right to limit the applicant to the option it had chosen.

[15] The dispute was indeed referred to arbitration on September 12, 2006. Arbitration proceedings were held on January 31 and February 1, 2007. The complaint alleging bargaining in bad faith was filed on January 15, 2007. The arbitral award was rendered on February 14, 2007.

[16] The applicant submits that, between the request for arbitration made on September 12, 2006, and the filing of the complaint alleging bad faith on January 15, 2007, there were no negotiations between the parties because of the Agency's bad faith, and the complaint was therefore admissible and should have been decided on the merits.

[17] However, that bad faith was the result of the Agency's difficulties in obtaining a mandate from the Treasury Board regarding wage offers, which was the case throughout the entire period prior to September 12, 2006, and which the applicant admitted through its request for arbitration did not amount to bad faith. In short, the situation after September 12, 2006, was the same as the one existing before that date; under the circumstances, the situation could therefore not form the basis for a complaint under paragraph 190(1)(*b*) of the Act.

[18] Finally, although the arbitral award had been rendered and the case closed, the applicant sought a declaration from the Board member for the future. The purpose of section 190 and, more specifically, paragraph (1)(*b*), is to require the parties to bargain in good faith and, to that end, obtain a declaration ordering them to continue bargaining in compliance with this statutory duty with a view to entering into the collective agreement being negotiated. Had the applicant acted in a timely manner to obtain such a declaration for the present, it would not have had to belatedly seek one for a future collective agreement.

[19] For these reasons, the application for judicial review will be dismissed with costs.

"Gilles Létourneau"

J.A.

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-435-08
Appeal of a decision of Renaud Paquet, Board Member of the Public Service Labour Relations Board, 2008 PSLRB 50, dated July 4, 2008.	
STYLE OF CAUSE:	Professional Institute of the Public Service of Canada v. Attorney General of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	June 2, 2009
REASONS FOR JUDGMENT OF THE COURT BY:	LÉTOURNEAU J.A. NADON J.A. BLAIS J.A.
DELIVERED FROM THE BENCH BY:	LÉTOURNEAU J.A.

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