Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20090925

Docket: A-25-09

Citation: 2009 FCA 276

CORAM: **NOËL J.A.**
NADON J.A.
EVANS J.A.

BETWEEN:

HARJINDER JOHAL and THOMAS STASIEWSKI

Appellants

and

CANADA REVENUE AGENCY and CHRISTINA MAO

Respondents

Heard at Ottawa, Ontario, on September 15, 2009.

Judgment delivered at Ottawa, Ontario, on September 25, 2009.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: NOËL J.A.
NADON J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] Harjinder Johal and Thomas Stasiewski, employees of Canada Revenue Agency ("CRA"), are appealing from a decision of the Federal Court, in which Deputy Judge Frenette denied their applications for judicial review. The appellants had asked the Court to set aside a final level decision by Lysanne M. Gauvin, Assistant Commissioner, Human Resources, CRA, dismissing their grievance against the CRA. The Federal Court's decision is reported as *Johal v. Canada (Revenue Agency*), 2008 FC 1397.

[2] The question to be decided in this appeal is whether the appellants are barred from presenting individual grievances under the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("*PSLRA*"), because the CRA's Staffing Program deals with the subject matter of their grievance.

[3] The appellants had grieved the CRA's appointment of one of its employees, Christina Mao, to an MG-05 position without a competition, after her return to work from an unpaid leave of absence granted for "family-related needs". The appellants said that her appointment was contrary to the CRA's Staffing Program because, while on leave, Ms Mao had worked full-time for another employer, a fact which precluded the CRA from granting her preferred status for an appointment to a position on her return.

[4] The Applications Judge held that Ms Gauvin correctly concluded that she had no jurisdiction under subsection 208(1) of the *PSLRA* to determine the appellants' grievance, because the CRA's Staffing Program provides recourse for grievances of this type. Subsection 208(2) states that an employee may not present a grievance under subsection 208(1) "in respect of which an administrative procedure for redress is provided under any Act of Parliament".

[5] The appellants say that Ms Gauvin committed a reviewable error when she failed to consider whether the recourse provided by the Staffing Program adequately addresses their grievance. They submit that the Staffing Program does not provide a meaningful remedy for them because the Directive on Preferred Status excludes employees without preferred status, such as the

appellants, from seeking recourse under the Staffing Program with respect to decisions concerning preferred status. Furthermore, they argue, it was unreasonable for Ms Gauvin to conclude on the basis of the material before her that the CRA was not obliged to deny Ms Mao preferred status when it learned that she had breached the terms of her leave of absence.

[6] I agree with the appellants that Ms Gauvin committed a reviewable error in deciding that subsection 208(2) bars the appellants from presenting a grievance under subsection 208(1), even though they have no recourse under the Staffing Program because they do not have preferred status. Section 54 of *Canada Revenue Agency Act*, S.C. 1999, c. 17 ("*CRAA*"), does not automatically exclude a grievance from subsection 208(1) when the Staffing Program deals with the subject matter of the grievance. Consequently, I would allow the appeal and remit the final level grievance to be dealt with on its merits by a different CRA officer.

B. FACTUAL BACKGROUND

[7] In May 2000, Ms Mao started a one-year "personal needs" unpaid leave of absence from her position with the CRA as a Team Leader (AU-03), in order to take employment with the Investment Dealers Association ("IDA"). This leave was granted in accordance with Article 17.11 of the collective agreement, which permits the CRA to grant a "Leave Without Pay for Personal Needs" of no more than one year.

[8] In March 2001, Ms Mao requested a five-year leave of absence for "family-related needs"; she was due to give birth in September. The CRA granted her request. Article 17.14 of the

collective agreement permits the CRA to grant an unpaid leave of absence of no more than five years “for the personal long-term care of the employee’s family”.

[9] In March 2002, the AU-03 position at the CRA that Ms Mao had occupied before taking her leaves of absence was converted to an MG-05 Team Leader position. In September 2006, she advised the CRA that she was ready to return to work. However, because her position had been “backfilled” (that is, permanently filled) during her absence she was granted a one-year leave of absence without pay and preferred status under the CRA’s Preferred Status Directive, a part of its Staffing Program which it developed pursuant to the *CRAA*, subsection 54(1). Preferred status facilitates a returning employee’s appointment to a permanent position at the same or equivalent level by giving them preference over other employees. Pending such an appointment, Ms Mao was assigned to a temporary AU-03 position.

[10] In May 11, 2007, Ms Mao was appointed without competition to an MG-05 Team Leader position on the basis of her preferred status. As a result, the three-month appointment of the acting incumbent of this position, the appellant Mr Johal, was cancelled.

[11] On her return to work, the CRA learned that Ms Mao had continued full-time employment with the IDA during her five-year leave of absence for family-related needs. An informal investigation by local CRA management determined that, although she had “pushed the envelope” in the use of her leave, she had not misused it. It is agreed by counsel that nothing turns on whether the CRA learned before or after she was granted preferred status how Ms Mao had used her leave.

[12] The appellants grieved the CRA's appointment of Ms Mao to the MG-05 position. Specifically, they alleged that granting preferred status to Ms Mao was an abuse of process and/or of authority on the part of local CRA management, which had not explained the basis of its decision. The grievance did not explicitly allege that the CRA should have rescinded, or refused to grant, Ms Mao's preferred status when it discovered that she had worked full-time during her leave for family-related needs.

[13] As already noted, the appellant Mr Johal had occupied this MG-05 position in an acting capacity, which was cancelled when Ms Mao was appointed to it. The other appellant, Mr Stasiewski, is also an employee of the CRA and would like to be considered for an MG-05 position. He is also the co-chair of the appellants' bargaining agent, a sub-group of the Professional Institute of the Pubic Service of Canada.

C. DECISION OF THE TRIBUNAL

[14] In the Final Level Grievance Reply, the decision under review, Ms Gauvin concluded that the substance of the appellants' grievance in respect of the appointment of Ms Mao was a staffing matter, and that recourse for staffing matters is specifically provided by the CRA's statutory Staffing Program. Accordingly, she held, the appellants were barred by subsection 208(2) of the *PSLRA* from presenting this grievance under subsection 208(1). The question of jurisdiction had not been raised in the first three levels at which the grievance had been considered.

[15] Ms Gauvin went on to state that some of the matters raised by the appellants did not concern them directly and that it would be a breach of the *Privacy Act*, R.S.C. 1985, c. P-21, for the CRA to give details "with respect to the outcome of decisions made". This is presumably a reference to the circumstances in which the CRA decided not to cancel Ms Mao's preferred status. Finally, Ms Gauvin concluded that she had found no "abuse of process on the part of local management in its application of the Canada Revenue Agency's policies and guidelines" and that there was therefore no reason to intervene.

D. DECISION OF THE FEDERAL COURT

[16] The Applications Judge decided on the basis of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 ("*Dunsmuir*"), that whether Ms Gauvin had jurisdiction to hear and determine the appellants' grievance was reviewable on a standard of correctness, and her decision that there had been no abuse of process and/or authority by the CRA was reviewable for unreasonableness as a question of mixed fact and law.

[17] He accepted the argument that subsection 208(2) precluded the appellants from presenting a grievance under subsection 208(1), on the ground that the Staffing Program issued under subsection 54(1) of the *CRAA* "is the complete code that governs recourses for the Agency's employees" (at para. 33). However, he also acknowledged that, because the appellants were precluded by Directive 'S' from pursuing recourse under the Staffing Program with respect to decisions concerning preferred status, the Staffing Program "has its remedial limitations on the applicants in this case".

[18] In the opinion of the Applications Judge, the appellants should have applied to the Federal Court for a judicial review of the appointment of Ms Mao. Noting the consent of the CRA, he granted the appellants' request for an extension of time by giving them leave to file their application in the Federal Court no later than 30 days from the date of his Order.

E. LEGISLATIVE FRAMEWORK

[19] Subsection 208(1) of the *PSLRA* defines the broad scope of the right of employees to present individual grievances with respect to decisions or actions by the employer. Counsel for the CRA concedes for the purpose of this appeal that, were it not for the limits imposed by subsection 208(2) on the right to grieve under subsection 208(1), the appellants' grievance falls under paragraph 208(1)(*b*). Section 214 provides that decisions at the final level in the grievance process are final and binding.

208. (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	208. (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :
(*a*) by the interpretation or application, in respect of the employee, of	*a*) par l'interprétation ou l'application à son égard :
(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or	(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,
(ii) a provision of a collective agreement or an arbitral award; or	(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;
(*b*) as a result of any occurrence or matter affecting his or her terms and conditions of employment	*b*) par suite de tout fait portant atteinte à ses conditions d'emploi

(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act*.	(2) Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception de la *Loi canadienne sur les droits de la personne*.
214. If an individual grievance has been presented up to and including the final level in the grievance process and it is not one that under section 209 may be referred to adjudication, the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken on it.	214. Sauf dans le cas du grief individuel qui peut être renvoyé à l'arbitrage au titre de l'article 209, la décision rendue au dernier palier de la procédure applicable en la matière est définitive et obligatoire et aucune autre mesure ne peut être prise sous le régime de la présente loi à l'égard du grief en cause.

[20] Further details of the process for presenting individual and other grievances are contained in Part 2 of the *Public Service Labour Relations Board Regulations*, SOR/2005-79 ("Regulations"), issued by the Board under subsection 237(1) of the *PSLRA*. However, since these are not directly material to the present appeal, I have not included them here.

[21] The *CRAA* confers exclusive authority on the CRA to appoint employees and requires it to develop a program governing, among other things, the appointment of staff and recourse for employees. It also provides that matters governed by the Staffing Program may not be included in a collective agreement.

53. (1) The Agency has the exclusive right and authority to appoint any employees that it considers necessary for the proper conduct of its business.	53. (1) L'Agence a compétence exclusive pour nommer le personnel qu'elle estime nécessaire à l'exercice de ses activités.
(2) The Commissioner must exercise the	(2) Les attributions prévues au paragraphe (1) sont exercées par le commissaire pour

appointment authority under subsection (1) on behalf of the Agency.	le compte de l'Agence.
54. (1) The Agency must develop a program governing staffing, including the appointment of, and recourse for, employees.	54. (1) L'Agence élabore un programme de dotation en personnel régissant notamment les nominations et les recours offerts aux employés.
(2) No collective agreement may deal with matters governed by the staffing program.	(2) Sont exclues du champ des conventions collectives toutes les matières régies par le programme de dotation en personnel.
56. (1) The Public Service Commission may prepare, or have prepared on its behalf, a report to the Agency on the consistency of the Agency's staffing program with the principles set out in the summary of its corporate business plan and must send a copy of the report to the Auditor General and the Treasury Board.	56. (1) La Commission de la fonction publique peut préparer — ou faire préparer — à l'intention de l'Agence un rapport sur la conformité du programme de dotation avec les principes énoncés dans le résumé du plan d'entreprise; elle envoie une copie du rapport au vérificateur général et au Conseil du Trésor.
(2) The Public Service Commission may periodically review the compatibility of the principles governing the Agency's staffing program with those governing staffing under the *Public Service Employment Act* and may report its findings in its annual report.	(2) La Commission de la fonction publique peut vérifier périodiquement la compatibilité des principes du programme de dotation de l'Agence avec les principes régissant la dotation sous le régime de la *Loi sur l'emploi dans la fonction publique* et faire état de ses conclusions dans son rapport d'activités.

[22] The CRA issued the Staffing Program pursuant to subsection 54(1) of the *CRAA*. The Directive on Preferred Status was adopted as Annex 'S' of the Program. The following provisions of that Directive are relevant to the appellants' grievance.

> 1.1 The purpose of granting Preferred Status is to endeavour to provide continued employment to permanent employees of the Canada Revenue Agency (CRA), where feasible, in accordance with CRA's business needs. This Directive does not apply to CRA's Executive Cadre.

1.3 Preferred Status may apply to the following situations:

a) Authorized leave of absence without pay, including permanent and temporary relocation of spouse;

…

1.4 Preferred Status may be denied in special circumstances. Reasons for denial of Preferred Status may include:

…

c) Other valid and justified reasons.

2.6.1 Employees on leave may occupy another position temporarily within the Agency on the condition that it is not inconsistent with the type of leave granted (dual employment). For example, an employee who is taking leave for the care and nurturing of children should not occupy another position. If that employee chooses to occupy another position, the leave should be terminated.

…

5.2.3 Employees without Preferred Status are not entitled to any recourse when an individual with Preferred Status is appointed except as part of the recourse normally applicable to a selection process (see article 2.3.2).

[23] The specific internal recourse mechanisms provided for disputes arising under the Staffing Program, including Annex 'S', are contained in Annex 'L' to the Staffing Program. However, the details are not directly material to the present appeal because Annex 'S' excluded the appellants from them.

F. ISSUES AND ANALYSIS

[24] In my opinion, this appeal raises two issues. First, does the CRA's Staffing Program, including Annex 'S', constitute a statutory procedure for redress for the purpose of subsection 208(2) and thus preclude the appellants from presenting their grievance under subsection 208(1)?

Second, if it does not, did Ms Gauvin commit a reviewable error when she held that there had been no abuse of process and/or of authority by the CRA as alleged by the appellants in their grievances?

Issue 1: Did the final level decision-maker commit a reviewable error when she decided that she had no jurisdiction to determine the appellants' grievance by virtue of subsection 208(2)?

[25] In order to answer this question, the Court must first determine the applicable standard of review. The Applications Judge held that whether the Staffing Program provides the appellants with recourse for their complaint is a jurisdictional question and is therefore reviewable on a standard of correctness.

(i) Standard of review

[26] There are two questions of law to be decided in this appeal. The first concerns the interpretation of subsection 208(2) of the *PSLRA*: does the Staffing Program provide "an administrative procedure for redress" for the appellants when it deals with the subject-matter of their grievance, but is not available to them because they do not have preferred status? The second question concerns the interpretation of section 54 of the *CRAA*: does a "program governing staffing" developed by the CRA automatically constitute "an administrative procedure for redress" for the purpose of subsection 208(2) if the program is intended to be comprehensive?

[27] The first step in a post-*Dunsmuir* standard of review analysis is to consider whether previous cases have already determined, in a satisfactory manner, the applicable standard of review: see *Dunsmuir* at para. 62.

[28] There is no case precisely on point. However, in similar contexts this Court has held that determining whether employees come within statutory exclusion clauses analogous to subsection 208(2) is a jurisdictional question, and therefore reviewable on a standard of correctness: see, for example, *Canada Post Corp. v. Pollard*, [1994] 1 F.C. 652 (F.C.A.) ("*Pollard*") and *Byers Transport Ltd. v. Kosanovich*, [1995] 3 F.C. 354 at 371 and 373 ("*Byers*") (*Canada Labour Code*), and *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27 ("*Boutilier*") (*Public Service Staff Relations Act*, the predecessor of the *PSLRA*).

[29] After those cases were decided, *Dunsmuir* (at para 54) expanded the scope of judicial deference to specialized tribunals' interpretation of their "home" legislation, and legislation closely related to it, emphasizing (at para. 59) that only the interpretation of those statutory provisions which raise "true" questions of jurisdiction or *vires* is reviewable on a standard of correctness. Further, writing for the Court in *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, Justice Rothstein inferred from *Dunsmuir* that reviewing courts must exercise caution in characterizing an issue as jurisdictional, and (at para. 34)

> … will only exceptionally apply a correctness of [*sic*] standard when interpretation of [the tribunal's home statute] raises a broad question of the tribunal's authority.

[30] In my opinion, correctness is the applicable standard of review in the present case because subsection 208(2) of the *PSLRA* and section 54 of the *CRAA* demarcate the jurisdiction of competing administrative processes, namely, that created under subsection 208(1) and that provided by the CRA's Staffing Program. According to *Dunsmuir* (at para. 61), correctness is normally the

standard of review for such questions. I see no reason not to apply that principle here, even though final level decisions are subject to the “final and binding” provision in section 214 of the *PSLRA*.

[31] Admittedly, the same CRA employees may entertain individual grievances under both subsection 208(1) and the Staffing Program. However, the grievance processes are not necessarily the same. For instance, the Staffing Program provides for two internal levels of recourse for grievances respecting the appointment of an individual with preferred status: individual feedback by the employee who made the impugned decision, and a decision review by the supervisor of that employee. On the other hand, employees presenting individual grievances under subsection 208(1) have a maximum of three levels of internal grievance process culminating in a final level decision by a senior member of the CRA’s staff, unless the collective agreement provides otherwise: subsection 237(2) of the *PSLRA*. In the present case, there are four levels.

[32] I would also note that the decision-maker is not an independent tribunal, but comprises members of the management of the employer whose actions are the subject of the grievance. Further, it is not clear from the statutory scheme whether final level decision-makers have the field experience, either as decision-makers or in the performance of their other employment-related duties, to equip them well to interpret the statutory provisions in question. Neither of these considerations favours deference.

(ii) Interpreting *PSLRA*, subsection 208(2)

[33] The English version of the statutory text is ambiguous and could have one of two meanings: either that the procedure for redress referred to in subsection 208(2) must be available to the employee who has presented a grievance under subsection 208(1), or that it must deal with the substance of the grievance, regardless of whether the particular employee grieving under subsection 208(1) has access to it.

[34] The French text, however, resolves the ambiguity by providing:

> Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de réparation **lui** a ouvert sous le régime d'une autre loi fédérale …

The pronoun "lui" makes it clear that a specific administrative recourse only bars an employee from presenting a grievance under subsection 208(1) if it is available to the employee presenting the grievance. However, the appellants have no recourse under the Staffing Program with respect to Ms Mao's appointment because Directive 'S' provides that, on the facts of the present case, only employees with preferred status may seek recourse when a person with preferred status is appointed.

[35] Accordingly, the appellants are not barred by the text of subsection 208(2) from presenting their grievance under subsection 208(1). As Justice Strayer stated in *Byers* (at para. 39), for a remedy provided under another statute to exclude a person from presenting a grievance under subsection 208(1) "the procedure must be capable of producing some real redress which could be <u>of personal benefit to the complainant</u>" (emphasis added).

[36] This interpretation of the text of subsection 208(2) is supported by its purpose, which is to ensure that employees resort to the recourse specifically provided to them for dealing with their employment grievance, and not to the general and residual recourse under subsection 208(1): *Boutilier* at paras. 3-4. This purpose would not be served by interpreting subsection 208(2) as providing that the existence of a specific recourse, to which an employee has no access, precludes that employee from presenting a grievance under subsection 208(1).

[37] The scheme of the *PSLRA* favours the internal, expeditious, and informal administrative resolution of workplace grievances. It would be inconsistent with this statutory objective to interpret subsection 208(2) as providing that an application for judicial review is the only recourse open to the appellants for dealing with their allegation that Ms Mao should not have been appointed to the MG-05 position by virtue of a preferred status to which she was not entitled.

(iii) Interpreting *CRAA*, section 54

[38] Counsel argues that section 54 of the *CRAA* authorizes the CRA to develop a comprehensive program for staffing matters and thereby impliedly precludes a CRA employee from presenting a grievance under subsection 208(1) with respect to a matter dealt with by the Staffing Program. Hence, she says, even though the Staffing Program provides no recourse for the appellants' grievance respecting Ms Mao's appointment by virtue of her preferred status, subsection 208(2) bars their right to proceed under subsection 208(1).

[39] I do not agree. Whether the CRA intended the Staffing Program to deal comprehensively with staffing matters is not the issue. The question is whether in enacting section 54 of the *CRAA*, Parliament intended that, once the CRA had developed a staffing program, an employee could no longer present an individual grievance under subsection 208(1) with respect to a staffing matter.

[40] There is nothing in the language of section 54 to indicate that Parliament intended to modify section 208 in the manner suggested by counsel. Further, subsection 54(2) expressly provides that no collective agreement may deal with a matter governed by the Staffing Program. Counsel is in effect arguing that we should interpret this provision as if it read, "No individual grievance presented under subsection 208(1) or collective agreement may deal with matters governed by the staffing program." If this is what Parliament had intended, it could easily have said so. The express removal from collective agreements of matters covered by a staffing program militates against implying the removal of individual grievances respecting such matters from section 208 as well: *expressio unius est exclusio alterius*.

[41] Consequently, in my opinion, the decision-maker exceeded her jurisdiction, or erred in law, when she concluded that subsection 208(2) bars the appellants from presenting their grievance about Ms Mao's appointment. However, unless this error is material, it is not necessarily dispositive of the appeal.

Issue 2: Did the decision-maker commit a reviewable error when she found that the employer had not abused its process and/or authority in appointing Ms Mao on the basis of her preferred status?

[42] Despite the decision-maker's conclusion that subsection 208(2) deprived her of jurisdiction to entertain the appellants' grievance, Ms Gauvin nonetheless addressed the merits of the grievance. I agree with the Applications Judge that unreasonableness is the standard of review applicable to the questions of mixed fact and law raised by this issue. Nonetheless, in my opinion the "merits" aspect of the final level decision does not meet this standard.

[43] The decision-maker's reasons are almost wholly conclusionary. They do not explain why the CRA was entitled to treat Ms Mao as having preferred status when, in an apparently flagrant breach of the terms of her leave, she had worked full-time for another employer during the five-year leave that she had been granted for family-related needs. There may be an explanation for CRA's granting Ms Mao preferred status in these circumstances, but it is not to be found in Ms Gauvin's reasons, which do not demonstrate that the decision-making process had the degree of "justification, transparency, and intelligibility" required for a decision to meet the standard of reasonableness: *Dunsmuir* at para. 47. The paucity of the decision-maker's reasons on the merits of the appellants' grievance may be because she had already decided that she had no jurisdiction to entertain it under subsection 208(1).

[44] Given the limited nature of the material in the record, the brevity of the reasons, and the agreed facts, I cannot tell whether the decision itself is reasonable as falling within the range of

"possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at para. 47.

[45] In these circumstances, I would refer the matter to a different decision-maker to resolve the appellants' grievance on its merits.

G. CONCLUSIONS

[46] For these reasons, I would allow the appeal with costs here and below, set aside the order of the Applications Judge, allow the appellants' application for judicial review to set aside the decision at the final level of the grievance process, and remit the grievance to be determined on its merits by a different decision-maker under section 208(1) of the *PSLRA*.

"John M. Evans"
J.A.

"I agree
Marc Noël J.A."

"I agree
M. Nadon J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-25-09
APPEAL FROM AN ORDER OF THE HONOURABLE ORVILLE FRENETTE DATED DECEMBER 18, 2008, NO. T-540-08.	
STYLE OF CAUSE:	HARJINDER JOHAL and THOMAS STASIEWSKI and CANADA REVENUE AGENCY and CHRISTINA MAO
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 15, 2009
REASONS FOR JUDGMENT BY:	Evans J.A.
CONCURRED IN BY:	Noël and Nadon JJ.A.
DATED:	September 25, 2009

APPEARANCES:

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