Federal Court of Appeal | Cour d'appel fédérale

Date: 20110125

Docket: A-101-10

Citation: 2011 FCA 24

CORAM: **SHARLOW J.A.**
DAWSON J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

CANADIAN UNION OF POSTAL WORKERS

Appellant

and

CANADA POST CORPORATION

Respondent

Heard at Toronto, Ontario, on January 17, 2011.

Judgment delivered at Ottawa, Ontario, on January 25, 2011.

REASONS FOR JUDGMENT BY: LAYDEN-STEVENSON J.A.

CONCURRED IN BY: SHARLOW J.A.
DAWSON J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20110125

Docket: A-101-10

Citation: 2011 FCA 24

CORAM: **SHARLOW J.A.**
DAWSON J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

CANADIAN UNION OF POSTAL WORKERS

Appellant

and

CANADA POST CORPORATION

Respondent

REASONS FOR JUDGMENT

LAYDEN-STEVENSON J.A.

[1] The appellant, Canadian Union of Postal Workers (the union), appeals from the order of a Federal Court judge (the judge) allowing Canada Post Corporation's (Canada Post) application for judicial review of a decision of an appeals officer of the Occupational Health and Safety Tribunal Canada under Part II of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code). The judge's reasons are reported at 2010 FC 154, 364 F.T.R. 177.

[2] Canada Post raised an objection before the appeals officer that the limitation period within which the union could appeal the direction of a health and safety officer had expired. Interpreting subsection 146(1) of the Code, the appeals officer concluded that the union's appeal was timely. On judicial review of that determination, the judge concluded that the applicable standard of review with respect to the appeals officer's decision is correctness and that the appeals officer's determination was neither correct nor reasonable.

[3] For the reasons that follow, I would allow the appeal, set aside the judge's order and restore the appeals officer's determination.

[4] The matter began when the union filed a complaint alleging that Canada Post had contravened various provisions under Part II of the Code, which concerns occupational health and safety. I need say no more about the facts because the issues on appeal are narrow. The parties agree, for purposes of this appeal, that the health and safety officer's letter dated December 23, 2008 and forwarded to the union on the same day, is the document pertinent to the appeals officer's determination. It is also common ground that, due to the closure of the union's offices over the holiday season, the union did not receive the document until its offices reopened on January 5, 2009.

The Statutory Provisions

[5] The text of the statutory provisions referred to in these reasons is attached as Schedule "A". It is the interpretation of subsection 146(1) that is at issue and, for ease of reference, it is reproduced below. I should note that section 146.2 grants various powers to appeals officers, including the power to "abridge or extend the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence."

Canada Labour Code (R.S.C. 1985, c. L-2)	*Code canadien du travail* (L.R.C. 1985, c. L-2)
146. (1) An employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer under this Part may appeal the direction in writing to an appeals officer within thirty days after the date of the direction being issued or confirmed in writing.	146. (1) Tout employeur, employé ou syndicat qui se sent lésé par des instructions données par l'agent de santé et de sécurité en vertu de la présente partie peut, dans les trente jours qui suivent la date où les instructions sont données ou confirmées par écrit, interjeter appel de celles-ci par écrit à un agent d'appel.

The Appeals Officer's Decision

[6] As stated earlier, the appeals officer concluded that the union's appeal was timely. He noted that the *Interpretation Act*, R.S.C. 1985, c. I-21 provides that statutes must be interpreted in a fair, large and liberal manner so as to ensure the attainment of their objectives (section 12). He considered the interpretation of the phrase "confirmed in writing" to be the key issue and concluded that the aggrieved person must be in receipt of the written confirmation before the appeal period

begins to run. He considered the union's claim, that it received the letter only on January 5, 2009, to be credible and found that it had instituted its appeal within the 30-day time limit.

The Judge's Decision

[7] The judge conducted a standard of review analysis and concluded that the applicable standard of review is correctness. He reasoned that the determination of a time limitation was not within the appeals officer's expertise and that the question was one that called for "certainty and consistency." He found no ambiguity in the legislation and concluded that the phrase "confirmed in writing" does not contemplate receipt of the health and safety officer's decision. In the judge's view, the relevant question was not when the safety officer's decision "was confirmed in writing *to* the union." Rather, it was when the decision "was issued or confirmed in writing *by* the Health and Safety officer." Although failure to receive a decision could be a factor for consideration in the exercise of discretion under paragraph 146.2(f) of the Code, it did not, in and of itself, delay the commencement of the subsection 146(1) limitation period. The judge held that the appeals officer's interpretation was both incorrect and unreasonable. A reasonable interpretation would focus on the health and safety officer's confirmation in writing, not on the complainant's reception of it.

Issues

[8] There are two issues:

(a) whether the judge erred in determining the applicable standard of review; and

(b) whether the judge erred in determining that the appeals officer's interpretation of subsection 146(1) was unreasonable.

The Standard of Review on Appeal

[9] On appeal from judicial review, the appeal court is to determine whether the judge selected the correct standard of review and applied the standard correctly: *Prairie Acid Rain Coalition v. Canada* (*Minister of Fisheries and Oceans*), [2006] 3 F.C.R. 610 at para. 14 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 197; *Telfer v. Canada* (*Revenue Agency*), 2009 FCA 23, [2009] D.T.C. 5046 at paras. 18-19.

Whether the Judge Erred in Determining the Applicable Standard of Review

[10] The union argues that the judge erred when he failed to rely on existing jurisprudence where the applicable standard of review in relation to appeals officers' decisions under the Code was held to be reasonableness. Specifically, the union points to this Court's decision in *Martin v. Canada* (*A.G.*), [2005] 4 F.C.R. 637 (C.A.) (*Martin*) and the Federal Court decision in *P&O Ports Inc. v. International Longshoremen's and Warehousemen's Union, Local 500*, 2008 FC 846, 331 F.T.R. 104 (*P&O Ports*). Canada Post maintains that *Martin* preceded the Supreme Court's decisions in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 (*Dunsmuir*) and *Canada* (*Minister of Citizenship and Immigration*) *v. Khosa*, [2009] 1 S.C.R. 339 (*Khosa*) and is therefore not determinative, while *P&O Ports* concerned a different issue.

[11] It is true that *Dunsmuir* teaches that a standard of review analysis is not required where the jurisprudence has "already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question" (para. 62). Both *Martin* and *P&O Ports* concerned an appeals officer's analysis of "danger" within the meaning of the Code. *Martin*

concerned an additional issue not relevant to this matter. The judge acknowledged and distinguished both authorities on the basis that the nature of the questions under consideration in those cases was different than that before him. Given the instruction at paragraph 54 of *Khosa* that a standard of review analysis is required "when jurisprudential categories are not conclusive," I conclude that the judge made no error in proceeding as he did.

[12] The union further argues that the judge erred in failing to find that the applicable standard of review is reasonableness. I agree with the union in this respect. I reject Canada Post's submission that the question is one which goes to jurisdiction. *Dunsmuir* cautions that "jurisdiction is intended in the narrow sense of whether the tribunal had the authority to make the inquiry" (para. 59). Canada Post conceded, at the hearing of the appeal, that the appeals officer has the statutory authority to interpret the impugned provision. The judge correctly observed, at paragraph 18 of his reasons, "it is not debatable that the Appeals Officer had the authority to make the inquiry and, in so doing, to interpret and apply s. 146(1) of the *Code*." Consequently, the issue is not one of jurisdiction, as it is now understood.

[13] The judge acknowledged the presumption discussed at paragraph 25 of *Khosa* to the effect that a tribunal's interpretation of its enabling legislation is normally reviewable on a standard of reasonableness. He noted the strong privative clauses in sections 146.3 and 146.4 of the Code. He discussed the purpose of Part II of the Code (to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment) and recognized that the thoroughness of the statutory scheme indicates a high level of deference. He considered the expertise of the appeals

officer to be greater than that of the court with respect to fact-intensive determinations in relation to investigations and inquiries under the Code. However, he found that the nature of the question at issue was not context specific. Relying on the decision of this Court in *Canada* (*A.G.*) *v. Mowat*, 2009 FCA 309, 312 D.L.R. (4th) 294, leave to appeal granted, [2009] S.C.C.A. No. 545, judgment pending (*Mowat*), he concluded that the nature of the question is one of general law beyond the expertise of the appeals officer and calls for consistency. Thus, it demands a standard of review of correctness.

[14] It seems to me, but for *Mowat*, the judge likely would have determined the standard of review to be reasonableness. I say this because, with the exception of the nature of the question at issue and the appeals officer's expertise relative to that of the court in answering it, all factors analysed by the judge pointed to deference. In *Mowat*, the question at issue was determined to be one of central importance to the legal system as a whole and outside the specialized area of the tribunal's expertise. In such circumstances, a standard of review of correctness is applicable: *Dunsmuir* at para. 54. In *Mowat*, neither the existing inconsistent interpretations nor the lack of a privative clause was determinative.

[15] In this case, although the judge found the interpretation of subsection 146(1) to be a question of general law, he did not find it to be one of central importance to the legal system as a whole. It would be difficult for him to do so. With respect, in my view, the interpretation of the provision gives rise to a discrete question that falls within a single step of a complex administrative scheme. It is a question of law arising out of the appeals officer's home statute and it was not suggested that it

would have important ramifications on any other aspects of the legal system. The union maintained that the provision is not one of central importance to the legal system and, at the hearing of this appeal, Canada Post acknowledged and accepted the accuracy of that position.

[16] Further, although the judge believed that the provision should be interpreted consistently, it had not been subject to inconsistent interpretations. Demanding a consistent answer for any question of general law may result in a correctness standard being applied to nearly all legal questions, whether or not they are of central importance to the legal system, whether or not conflicting lines of jurisprudence have arisen with respect to them, and whether or not the questions involve the interpretation of the decision maker's home statute. This cannot be right for, as noted above, a tribunal's interpretation of its constitutive statute generally is entitled to deference: *Khosa* at para. 25.

[17] Additionally, determination of the applicable standard of review is accomplished by establishing legislative intent: *Dunsmuir* at para. 30; *Khosa* at para. 30. Although the existence of a privative clause is not determinative, it provides "a strong indication of legislative intent": *Dunsmuir* at para. 31. Section 146.3 of the Code provides that an appeals officer's decision is final and shall not be questioned or reviewed in any court. Section 146.4 is expressed in even stronger terms. Neither section indicates a distinction is to be made according to the nature of the question or provision.

[18] In my view, the comprehensive statutory scheme is designed, in part, to facilitate the resolution of health and safety matters expeditiously. Given the presumption owing to appeals officers in their interpretation of the home statute, the discrete nature of the question at issue, the detailed and comprehensive statutory scheme, the expertise of the appeals officers working within that scheme and the existence of strong privative clauses, reasonableness is the appropriate standard of review. The interpretation of the impugned provision does not rise to the level of any recognized exception to the general rule of deference.

Whether the Judge Erred in Determining that the Appeals Officer's Interpretation of Subsection 146(1) was Unreasonable

[19] After adopting a correctness standard of review, the judge found the appeals officer's interpretation of subsection 146(1) to be incorrect. He also found the interpretation to be unreasonable. For convenience, I again set out the provision in issue.

146. (1) An employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer under this Part may appeal the direction in writing to an appeals officer within thirty days after the date of the direction being issued or confirmed in writing.	146. (1) Tout employeur, employé ou syndicat qui se sent lésé par des instructions données par l'agent de santé et de sécurité en vertu de la présente partie peut, dans les trente jours qui suivent la date où les instructions sont données ou confirmées par écrit, interjeter appel de celles-ci par écrit à un agent d'appel.

[20] For an appeal to be timely, it must be initiated “within thirty days after the date of the direction being issued or confirmed in writing.” As noted earlier, the pertinent document was dated and forwarded to the union on December 23, 2008. The heart of the interpretive task fell to be resolved by asking at what stage the document effected confirmation in writing.

[21] The appeals officer determined that confirmation occurred on January 5, 2009 when the union opened its offices after the holiday season and received the document. The judge disagreed. On a correctness standard, he concluded, “there is no indication whatsoever that the confirmation has to do with the reception of communication of the direction to the concerned parties.” In the judge’s view, there is no ambiguity in the legislation. While the failure to see the document might be a factor for consideration in the exercise of the appeals officer’s discretion to extend the time for appealing under paragraph 146.2(f), it did not delay the commencement of the limitation period. The judge determined that to interpret the phrase “confirmed in writing” as referring to the moment when the direction is confirmed and received leads to an interpretation that the statute cannot reasonably bear. However, to arrive at that conclusion, the judge had to resort to his "correct" interpretation.

[22] The union maintained that the appeals officer provided clear and principled justification for his decision, supported by principles of statutory interpretation, and consistent with prior jurisprudence interpreting similar statutory provisions. Canada Post, in my view appropriately, does not challenge the intelligibility or level of justification contained in the appeals officer’s reasons. It contends that the appeals officer’s interpretation was both incorrect and unreasonable. Since I have

concluded that the correctness standard does not apply, the sole remaining issue is whether the decision falls within an acceptable range of outcomes which are defensible in respect of the facts and the law: *Dunsmuir* at para. 47.

[23] In *Celgene Corp. v. Canada (A.G.)*, 2011 SCC 1, the Supreme Court reaffirmed the principle that statutory interpretation involves a consideration of the ordinary meaning of the words used and the statutory context in which they are found. "The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute" (para. 21).

[24] The phrase "confirmed in writing" may lend itself to different interpretations. It may mean "reduced to writing", "typed on a computer", "printed", "mailed", or any number of other things, including "received." Therefore, the phrase, on its own, is not clear. In my view, the underlying purpose of the confirmation is to inform the person or entity for whose benefit the confirmation occurs. The appeals officer relied on such reasoning to arrive at his conclusion. Although the judge saw "no indication whatsoever that the confirmation has to do with the reception of communication of the direction to the concerned parties," subsections 145(1), 145(1.1), 145(5) and 145(6) of the Code, read together, demonstrate that the confirmation is, among other things, for the benefit of an aggrieved party.

[25] In *Toney v. Annapolis Valley First Nations Band*, 2004 FC 1728, 267 F.T.R. 186, the Federal Court addressed subsection 240(2) of the Code. That provision requires unjust dismissal complaints to be made "within ninety days from the date on which the person making the complaint

was dismissed." Kelen J. held that an interpretation whereby the limitation period began to run when the complainant received constructive notice that he had been dismissed was reasonable.

[26] The judge believed the appeals officer's interpretation rendered the discretion in paragraph 146.2(f) (power to extend the time limit) redundant. I agree with the union that the 146.2(f) discretion remains relevant. On the appeals officer's interpretation, the discretion simply applies where appeals are initiated beyond thirty days from the date of receipt of the document. The judge was also concerned about potential appellants evading delivery. Again, I agree with the union that the normal fact-finding function of the appeals officer is available to ascertain when receipt occurred.

[27] As stated previously, in conducting a review for reasonableness the court asks whether there exists sufficient justification, transparency and intelligibility in a tribunal's decision-making process. There is no suggestion from either party, or in the judge's reasons, that the appeals officer is to be faulted in this respect.

[28] The court also asks whether the decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law. Judicial review on a standard of reasonableness endorses the notion that no single interpretation of a provision will necessarily result: *Dunsmuir* at para. 47; *Khosa* at para. 25. Moreover, deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances

of the legislative regime": *Dunsmuir* at para. 49; *Khosa* at para. 25 citing David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 C.J.A.L.P. 59 at 93.

[29] On a standard of review of reasonableness, I am unable to conclude that the appeals officer's decision was outside the range of possible, acceptable outcomes. It was not inconsistent with the object and purpose of the statutory scheme. Rather, it furthered them. Since the appeals officer's interpretation of the time limitation was one that was reasonably open to him, the judge erred in concluding otherwise.

[30] I would allow the appeal, set aside the judge's order and restore the appeals officer's determination. I would award the union its costs of the appeal.

"Carolyn Layden-Stevenson"
J.A.

"I agree
K. Sharlow J.A."

"I agree
Eleanor R. Dawson J.A."

SCHEDULE "A"
TO THE REASONS:
Canadian Union of Postal Workers and Canada Post Corporation
A-101-10
Dated January 25, 2011

Canada Labour Code **(R.S.C. 1985, c. L-2)**	***Code canadien du travail*** **(L.R.C. 1985, c. L-2)**
145 (1.1) A health and safety officer who has issued a direction orally shall provide a written version of it (*a*) before the officer leaves the work place, if the officer was in the work place when the direction was issued; or (*b*) as soon as possible by mail, or by facsimile or other electronic means, in any other case.	145 (1.1) Il confirme par écrit toute instruction verbale : *a*) avant de quitter le lieu de travail si l'instruction y a été donnée; *b*) dans les meilleurs délais par courrier ou par fac-similé ou autre mode de communication électronique dans tout autre cas.
…	…
145 (6) If a health and safety officer issues a direction under subsection (1), (2) or (2.1) or makes a report referred to in subsection (5) in respect of an investigation made by the officer pursuant to a complaint, the officer shall immediately give a copy of the direction or report to each person, if any, whose complaint led to the investigation.	145 (6) Aussitôt après avoir donné les instructions visées aux paragraphes (1), (2) ou (2.1), ou avoir rédigé le rapport visé au paragraphe (5) en ce qui concerne une enquête qu'il a menée à la suite d'une plainte, l'agent en transmet copie aux personnes dont la plainte est à l'origine de l'enquête.
…	…
146. (1) An employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer under this Part may appeal the direction in writing to an appeals officer within thirty days after the date of the direction being issued or	146. (1) Tout employeur, employé ou syndicat qui se sent lésé par des instructions données par l'agent de santé et de sécurité en vertu de la présente partie peut, dans les trente jours qui suivent la date où les instructions sont données ou

confirmed in writing.

…

146.2 For the purposes of a proceeding under subsection 146.1(1), an appeals officer may
(*f*) abridge or extend the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence;

…

146.3 An appeals officer's decision is final and shall not be questioned or reviewed in any court.

146.4 No order may be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an appeals officer in any proceeding under this Part.

Interpretation Act
(R.S.C. 1985, c. I-21)

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

confirmées par écrit, interjeter appel de celles-ci par écrit à un agent d'appel.

…

146.2 Dans le cadre de la procédure prévue au paragraphe 146.1(1), l'agent d'appel peut :
f) abréger ou proroger les délais applicables à l'introduction de la procédure, à l'accomplissement d'un acte, au dépôt d'un document ou à la présentation d'éléments de preuve;

…

146.3 Les décisions de l'agent d'appel sont définitives et non susceptibles de recours judiciaires.

146.4 Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action de l'agent d'appel exercée dans le cadre de la présente partie.

Loi d'interprétation
(L.R.C. 1985, c. I-21)

12. Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-101-10
(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE DE MONTIGNY DATED FEBRUARY 16, 2010, DOCKET NO. T-743-09)	
STYLE OF CAUSE:	CANADIAN UNION OF POSTAL WORKERS v. CANADA POST CORPORATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 17, 2011
REASONS FOR JUDGMENT BY:	LAYDEN-STEVENSON J.A.
CONCURRED IN BY:	SHARLOW J.A. DAWSON J.A.
DATED:	January 25, 2011

APPEARANCES:

Paul Cavalluzzo Jo-Anne Pickel	FOR THE APPELLANT
Stephen Bird	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cavalluzzo Hayes Shilton McIntyre & Cornish LLP Barristers & Solicitors Toronto, Ontario	FOR THE APPELLANT
Bird Richard Barristers & Solicitors Ottawa, Ontario	FOR THE RESPONDENT