Federal Court of Appeal | Cour d'appel fédérale

Date: 20200221

Docket: A-37-19

Citation: 2020 FCA 52

CORAM: **BOIVIN J.A.**
GLEASON J.A.
RIVOALEN J.A.

BETWEEN:

CANADIAN FEDERAL PILOTS ASSOCIATION

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on February 12, 2020.

Judgment delivered at Ottawa, Ontario, on February 21, 2020.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: BOIVIN J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The applicant seeks to set aside part of the decision rendered by the Federal Public Sector Labour Relations and Employment Board on December 11, 2018 in *Canadian Federal Pilots Association v. Department of Transport, Transportation Safety Board, and Treasury Board Secretariat*, 2018 FPSLREB 91. In that decision, the Board dismissed the applicant's bad faith bargaining complaint and its complaint under subsection 186(1) of the *Federal Public Sector*

Labour Relations Act, S.C. 2003, c. 22, s.2 (the Act) but allowed in part its complaint alleging a violation of the statutory freeze enshrined in section 107 of the Act.

[2] In this application for judicial review, the applicant seeks to have this Court set aside four portions of the Board's decision that were unfavourable to it. First, the applicant contests the Board's decision in respect of the bad faith bargaining complaint. Second, the applicant contests the Board's decision in respect of the statutory freeze complaint as it relates to changes to the Professional Aviation Currency Program (the PACP), a jointly negotiated policy outside the collective agreement, but recognized in the agreement, that governs the way in which members of the applicant maintain their currency as pilots. Third, the applicant contests the Board's decision in respect of the statutory freeze complaint as it relates to changes made to Transport Canada's Policy Letter 164, a management policy that outlines Air Carrier Inspector training requirements. Finally, the applicant contests the Board's dismissal of its subsection 186(1) complaint.

[3] In its bad faith bargaining complaint, the applicant alleged that the employer had refused to engage in full and rational discussion with respect to the applicant's proposals to modify Article 47 in the parties' collective agreement, the provision that deals with professional aviation currency. The Board dismissed this claim, finding that the applicant had not discharged its onus of establishing on a balance of probabilities that the employer had breached its duty to bargain in good faith as the applicant's Article 47 proposals were to be the subject of further discussion between the parties during a mediation session and they accordingly were not at impasse in respect of this issue.

[4] In the portions of its statutory freeze complaint that are relevant to this application, the applicant alleged that the employer made unilateral changes to employees' terms and conditions of employment during the freeze period in violation of section 107 of the Act by making unilateral reductions to the PACP (by reducing the sites where employees had the option of maintaining their currency through active flying as opposed to using a simulator) and by making changes to Policy Letter 164 to reflect current training requirements.

[5] With respect to the allegations concerning the amendments to the PACP, the Board found that the program was a term and condition of employment that could be the subject of collective bargaining under the Act and thus could be subject to the statutory freeze under section 107 of the Act, but held that the PACP afforded the employer the authority to make the types of changes it made. The Board thus concluded that the employer was not prohibited from making the impugned amendments during the freeze period under the applicable case law of the Board, which enshrines a so-called "business as before" as opposed to a static approach to the freeze. In reaching this conclusion, the Board referred to Article 47 of the collective agreement and several provisions in the PACP, which leave to management the decision of how bargaining unit members are to maintain their currency. The Board also referred to a prior award of an adjudicator of its predecessor in *Canadian Federal Pilots Association v. Treasury Board (Department of Transport)*, 2014 PSLRB 64, 119 C.L.A.S. 276, which held that, under the applicable provisions in the collective agreement and the PACP, the employer possesses the unilateral right to make changes like those impugned by the applicant. The Board also noted that similar changes had been made by the employer in the past and thus determined that the

impugned changes fell within a “business as before” approach to the maintenance of pilot currency.

[6] With respect to the allegations concerning the changes to Transport Canada’s Policy Letter 164, the Board held that the letter was not a term or condition of employment that was frozen under section 107 of the Act but, rather, a unilaterally promulgated management policy that was under review well before the freeze commenced. The Board further noted that it was not contested that management possessed the right to set training requirements. It found that, in making the impugned changes to the letter, the employer was entitled to adapt it to reflect changes that had previously been made to training requirements. The Board accordingly determined that the impugned changes did not violate section 107 of the Act.

[7] Finally, with respect to the subsection 186(1) complaint, the Board held that there had been no interference with the applicant by any of Transport Canada, the Treasury Board or the Transportation Safety Board in making the impugned changes and that employer representatives had not sought to negotiate such changes with bargaining unit employees.

[8] During the hearing before this Court, counsel for the applicant advised the Court that the parties had recently settled their collective agreement. The settlement renders the portion of this application dealing with the applicant’s bad faith bargaining complaint moot. Despite this, both parties requested the Court rule on this aspect of the application to provide guidance for future rounds of bargaining. As was discussed at paragraphs 29-42 of *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 92 N.R. 110, courts possess discretion to decide moot issues.

Given the parties' joint request that the Court address this issue, I would exercise my discretion in favour of so doing as settling the issue may well provide guidance for future rounds of bargaining.

[9] Turning to the merits of the bad faith bargaining issue, as the respondent rightly notes, the Board's case law, as well as that of other Canadian labour boards, establishes that the duty to bargain in good faith does not prevent hard bargaining or require a party to agree to proposals like those advanced by the applicant. What is rather prohibited is conduct that is designed to frustrate the reaching of an agreement (see, e.g. *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.*, 2014 SCC 45, [2014] 2 S.C.R. 323 at paras. 34-35, 71; *Canadian Union of Public Employees. v. Labour Relations Board (N.S.) et al.*, [1983] 2 S.C.R. 311, 49 N.R. 107; *Professional Institute of the Public Service of Canada v. Treasury Board*, 2009 PSLRB 102, [2009] C.P.S.L.R.B. No 102 at para. 85).

[10] Here, the Board made a factual determination that the employer had not engaged in such conduct as it showed a willingness to discuss issues related to the applicant's Article 47 proposals during mediation. Such a finding provided the Board a reasonable basis for dismissing the applicant's bad faith bargaining charge. Moreover, contrary to what the applicant asserts, it was reasonable for the Board to have considered the contemplated mediation session as part of the bargaining process. Indeed, it is not unusual for parties in complex negotiations to hive off particularly contentious issues and send them to mediation or to discuss them in a setting smaller than at the main bargaining table in an effort to explore resolution possibilities. Thus, there is no basis for interfering with the Board's decision in respect of the bad faith bargaining complaint.

[11] Similarly, the factual determinations made by the Board provided a reasonable basis for dismissing the portions of the statutory freeze complaint challenged by the applicant. In particular, the fact that Transport Canada had a history of making similar changes to the PACP and that its terms and Article 47 of the collective agreement allowed the employer to make such changes provided the Board more than ample basis to reject this portion of the applicant's statutory freeze complaint. Likewise, the fact that the employer had set in motion the process to amend Policy Letter 164 before the onset of the freeze and that the impugned changes to the policy letter merely reflected changes that had been previously made to training requirements provided a reasonable basis for the Board's dismissal of this portion of the statutory freeze complaint.

[12] The Board case law relied on by the applicant in respect of statutory freeze issues involves readily distinguishable situations, where an employer altered long-standing previous practices after bargaining had commenced and had no prior history of making changes of a similar nature. It was not necessary for the Board to have referred to such case law in its decision or to have articulated the "reasonable employee expectation test", which likely would have led to a similar result on these facts, in any event. Indeed, as noted by the Board at paragraph 76 in *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2016 PSLREB 19, one of the cases relied on by the applicant, the "'business as before test' …would not be contradicted by the 'reasonable expectations' test". Under either articulation, what is relevant is whether the impugned changes commenced before the onset of the freeze or were part of the way in which the employer previously operated or could reasonably be expected to

operate. Given the facts as found by the Board, the impugned changes could be reasonably so characterized.

[13] Finally, there is no basis to interfere with the Board's dismissal of the subsection 186(1) complaint. The sole decision relied on by the applicant in support of an opposite conclusion (*S.M.W.I.A. v. Canadian National Railway* (1994), 26 C.L.R.B.R. (2d) 256, 94 C.L.L.C. 16 (Can. L.R.B.)) was decided by a different board and involved a very different fact pattern, where the employer sold a major portion of its operations without notice, thereby depriving employees of the opportunity to exercise rights under complex employment security provisions. Here on the other hand, the impugned changes were much less significant. It was accordingly open to the Board to have dismissed the interference complaint.

[14] I would therefore conclude that the impugned portions of the Board's decision are reasonable and would accordingly dismiss this application with costs.

"Mary J.L. Gleason"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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