Federal Court of Appeal

Cour d'appel fédérale

Date: 20131209

Docket: A-43-13

Citation: 2013 FCA 286

CORAM: **BLAIS C.J.**
DAWSON J.A.
O'REILLY J.A. (*ex officio*)

BETWEEN:

**GREG IRVINE, GUY RICHARD JOHNSON,
FRANK PETER DEHEER,
KURTIS ENGLAND, RONALD LYVER,
CHRISTOPHER TERRANCE MATECHUK,
PATRICK MACISSAC, BRIAN MEARS, MITCH
ROWLAND, J. P. PAUL SIMARD,
ED HALL, STEVE VIGOR, PETER SHERSTAN,
SEAN LOWE, AL BAIRD,
MARC KOREMAN, PAUL WHITE, RON
CHRISTIANSON, ROB LIDGETT,
WILL WARK, GORD CORBETT, MARCO LOU,
SHANE POWERS,
BOB VATAMANIUCK, JAY PENNER, JIM
LANK, DAVE ALBRECHT,
TOM MATERI, PETER ROSS, DAN JAKEL,
PHIL TAWTEL, BILL HAMILTON,
DARRYL URANO, KEITH O'NEILL, DAVID
GAZLEY, RAYMOND PEACOCKE,
RANDALL PEARSON and JASON PERRY**

Appellants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Calgary, Alberta, on October 2, 2013.

Judgment delivered at Ottawa, Ontario, on December 09, 2013.

REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	BLAIS C.J. O'REILLY J.A. (*ex officio*)

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The appellants are members of the RCMP Emergency Response Team located in "K" Division (Alberta). They applied in the Federal Court for judicial review of the decision of an RCMP Level II Grievance Adjudicator which determined they were not entitled to standby compensation for time spent on-call. The Federal Court dismissed their application for judicial review (2012 FC 1370). The appellants now appeal from the decision of the Federal Court.

The Facts

[2] The facts are set out extensively in the decision of the Federal Court. For the purpose of this appeal it is sufficient to explain that members of RCMP Emergency Response Teams (ERTs) are assaulters and sniper/observers who are specially trained in the use of various tactical procedures and weapons. As the Federal Court Judge explained in his reasons, an ERT may be deployed to provide armed back-up support in emergency situations including hostage situations, high-risk arrests or emergencies within penitentiaries. Service on an ERT is voluntary.

[3] Members of ERTs are expected to be available to respond to emergency situations whenever they arise. Thus, ERT members are required to carry a pager at all times (unless they have given notice they will be out of the Division). Further, ERT members are not permitted to do anything that might impair their ability to respond to an emergency situation. Examples of prohibited conduct include the consumption of alcohol and travel to a remote area.

[4] The appellants are not compensated for maintaining this constant state of readiness. Accordingly, they filed a grievance seeking compensation for time spent on call. Specifically, they sought Standby Level II compensation, under which they would be paid for one hour of work for every eight hours spent on call.

The Decision of the Grievance Level II Adjudicator (Adjudicator)

[5] Included in the reasons of the Adjudicator was reference to certain provisions found in the RCMP Administration Manual. Chapter II.9 section E.1.j of the manual defines Standby Level II to occur "when a member voluntarily makes himself/herself available for duty on reasonably short notice at identified locations."

[6] The Adjudicator made a number of findings of fact, including the fact that in "K" Division no one had identified locations where Standby Level II was authorized for ERTs.

The Decision of the Federal Court

[7] The Federal Court found the reasons of the Adjudicator provided sufficient justification, transparency and intelligibility within the decision-making process, and that the decision fell within the range of possible, acceptable situations which are defensible in respect of the facts and the law. It followed that the decision was reasonable (reasons of the Federal Court at paragraph 64).

The Issue on Appeal

[8] The sole issue on appeal is whether the Federal Court properly applied the reasonableness standard of review to the Adjudicator's decision.

Standard of Review

[9] On an appeal from a decision of the Federal Court disposing of an application for judicial review, this Court is required to determine whether the Federal Court identified the appropriate standard of review and applied it correctly (*Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, 386 N.R. 212 at paragraph 18). If the Federal Court selected and applied the wrong standard, this Court then proceeds to apply the correct standard of review. If the correct standard was applied by the Federal Court, this Court then ensures that it was applied properly and, where necessary, remedies errors which were made.

[10] In the present case, the parties agree that the Judge selected the reasonableness standard of review and that this was the correct standard of review to be applied. In my view, the parties have correctly stated both the Judge's selection and the standard of review to be applied to the decision of the Adjudicator.

Consideration of the Issue

[11] The appellants submit that basing a decision upon irrelevant considerations renders a decision unreasonable. They further submit that the Adjudicator based his decision on factors this Court found to be irrelevant in *Brooke v. Canada (Royal Canadian Mounted Police (RCMP), Deputy Commissioner)* (1993), 152 N.R. 231, (F.C.A.) and that the Federal Court upheld the decision on similarly irrelevant grounds.

[12] In *Brooke*, the applicable definition provided that a "member is on Standby when he/she is ordered to remain available and able to respond immediately to a duty requirement." The

adjudicator in *Brooke* dismissed the grievance because the person who gave the required standby order lacked authority to do so, and in any case the affected members were not on standby. The adjudicator reached the latter conclusion after considering:

- The definition as to when a member is on standby.
- Standby was a very special circumstance, only to be employed when all other alternatives have been addressed.
- Standby was to be authorized only when an emergency exists or when emergent circumstances are so demanding that the standby is required.
- There could be no permanent and therefore continuous standby.

[13] This Court set aside the adjudicator's decision. The adjudicator had focused on the procedure used to authorize standby, that is the fact the person who ordered members to be on standby lacked the authority to do so. The adjudicator failed to focus upon the relevant definition. The remaining factors considered by the adjudicator were found by the Court to be irrelevant. The adjudicator's finding that the members had been ordered to standby was sufficient to establish that they met the definition of "standby" under the relevant definition.

[14] In my view, the situation in the present case is distinguishable from that in *Brooke* because in the present case, the Adjudicator had regard to the applicable definition and reasonably applied it to the appellants' circumstance. The reasonableness of the Adjudicator's application of the definition is demonstrated by the fact that the appellants acknowledged in their written submission to the Adjudicator that they did not meet the definition. On page one of their submission (appeal book page 121) they wrote:

> ii: Approval of the location must be given by CO/Director/delegate.
>
> The level I [decision] states that there is no evidence of a request or it's denial in any submission advanced. While that may be true, common sense and common practice should be relied upon in this regard. ERT Members were aware there had not been approval for the location for Standby II to be paid. Location in this instance is relative to a Detachment or a unit. This unit works everywhere in the Province so it is unreasonable to assume that approval would be given for individual locations. That particular piece of policy does not make sense in relation to ERT and should not be relied upon to base any decision on relative to whether or not this unit should be paid Standby II as they do not have a work "location" per se. It could be said that this policy has no bearing at all on ERT as they don't have a defined location. [underlining added]

[15] It was therefore open to the Adjudicator on the record to have regard to the applicable definition and find the appellants did not fall within it.

[16] To the extent the Adjudicator considered other factors, those factors did not materially affect his conclusion that the appellants did not meet the definition for inclusion in Standby Level II pay. To a large extent the Adjudicator's comments now said to be irrelevant were directed to submissions made to the Adjudicator by the appellants.

[17] As I have concluded that the decision of the Adjudicator was reasonable, I would dismiss the appeal with costs. In doing so I rely on the reasonableness review contained herein and should not be seen to endorse the language of the Federal Court decision in its entirety.

"Eleanor R. Dawson"

J.A.

"I agree,
Pierre Blais C.J."

"I agree,
James W. O'Reilly
(ex officio)"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-43-13	
STYLE OF CAUSE:		GREG IRVINE AND OTHERS v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	CALGARY, ALBERTA	
DATE OF HEARING:	OCTOBER 2, 2013	
REASONS FOR JUDGMENT BY:		DAWSON J.A.
CONCURRED IN BY:		
CONCURRING REASONS BY:		
DISSENTING REASONS BY:		
DATED:	DECEMBER 9, 2013	

APPEARANCES:

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