

Date: 20080415

Docket: T-832-06

Citation: 2008 FC 485

Vancouver, British Columbia, April 15, 2008

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

**PUBLIC SERVICE
ALLIANCE OF CANADA**

Applicant

and

**ATTORNEY
GENERAL OF CANADA**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Public Service Alliance of Canada (“PSAC” or the “Applicant”) seeks judicial review, pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, of the decision of Adjudicator Ian R. MacKenzie (the “Adjudicator”). In his decision, made on April 13, 2006, the Adjudicator determined that the Canada Revenue Agency (the “CRA”) had met its obligations

pursuant to the Work Force Adjustment (“WFA”) Appendix to the collective agreement between the CRA and the Applicant.

[2] In its Notice of Application for judicial review, the Applicant seeks the following relief:

- i. An Order setting aside the decision of Public Service Labour Relations Board dated April 13, 2006;
- ii. An Order referring the matter back to the Board with the direction that the Board consider the Applicant’s section 99 reference on its merits; or, in the alternative,
- iii. An Order remitting the grievance back to the Public Service Labour Relations Board for consideration in accordance with the directions of this Court;
- iv. The costs of this application; and
- v. An Order granting such further and other relief as counsel may request and this Honourable Court may permit.

II. Background

[3] The Applicant is the certified bargaining agent for the Program Delivery and Administrative Service group bargaining unit at the CRA. As the result of a budget announcement made on February 24, 2005, the CRA was required to cut \$110 million from its budget.

[4] On February 24, 2005, the CRA met with union representatives, including representatives of PSAC, following the announced budget cut. A CRA representative made a presentation and this document stated that “[f]ull implications are still being assessed” and there will be “impacts on jobs”. The presentation estimated a reduction of 1,175 permanent full-time equivalent positions with a potential job loss of some 300 to 400 permanent employees. The presentation further stated that the CRA was committed to reducing the impact of the budget cuts and would use attrition, reallocation and retraining opportunities to assist employees in maintaining “viable employment with the CRA”. The question and answer document that was presented contained more information on the impact of the expenditure review on employees of the CRA.

[5] Mr. Pierre Mulvihill, a Labour Relations Officer with the Union of Taxation Employees (“UTE”), a component of PSAC, attended the meeting of February 24, 2005. He requested the CRA to issue a letter to employees at the cash and enquiries counters who were affected by the budget cuts.) Bonnie Lehman, Senior Staff Relations Advisor at the CRA, replied to him by voicemail on or about March 15, 2005 and advised that the CRA would be conducting a human resource impact analysis. Mr. Mulvihill was then instructed by the National President of the UTE, Ms. Betty Bannon, to proceed with filing a complaint.

[6] On April 11, 2005, PSAC presented a policy grievance to the CRA pursuant to section 220 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2, being Part 1 of the *Public Service Modernization Act*, S.C. 2003, c. 22 (the “PSLRA”).

[7] In the grievance, PSAC alleged that employees with certain functions in their statement of duties and employees with client services counter functions, also known as “enquiries counter”, in their statement of duties should have been declared affected under the WFA Appendix of the collective agreement on February 24, 2005. The policy grievance was referred to adjudications on June 1, 2005.

[8] The CRA responded to the policy grievance on September 16, 2005. It said that it had not yet made a determination as to whether it would proceed to declare employees affected. The CRA met with PSAC on November 30, 2005 to advise that there would be a WFA situation. On December 6, 2005, 314 employees were advised that they were affected.

[9] The hearing of the grievance took place on February 1 and 2, 2006. The Adjudicator dismissed the grievance, finding that the issue before him was when the collective agreement obligation to advise and consult with PSAC, in a WFA situation, arises.

[10] The Adjudicator summarized the evidence that was submitted. One witness testified for each party and a joint book of documents was submitted.

[11] Ms. Marjorie Ogden, Director General of Taxpayer services at the CRA, testified the announcement of February 24, 2005 was a “strategic directive” that indicated that the CRA wanted to review the manner in which it dealt with clients through the counter services. The strategic directive was to use more self-serve options.

[12] The Commissioner of the CRA, Mr. Michael Dorais, issued a message to all employees on June 17, 2005 in which he said that he was updating all employees on an area where consultations had “resulted in a change to our previous proposals.” He announced that the CRA would maintain the cash counters. He noted that bargaining agent representatives had asked the CRA to review the decision about enquiries counters. He added that after careful consideration the CRA had concluded that the original decision to modify access to services by requiring appointments was appropriate.

[13] In June 2005, the Commissioner determined that the approach to the expenditure review was worth exploring and that it should be taken to the field level. He asked that officials begin reviewing the impact on human resources. At this stage, the CRA began to deal with each regional office to determine realistic budget options. Based on these budget allocations, local managers were asked how many indeterminate employees were involved. Local officers submitted the numbers in September and October 2005.

[14] The Adjudicator found that before the WFA notice provisions are triggered, the CRA must have made a decision with sufficient precision to identify the work location, the positions that will be affected and the date on which those positions will be affected. He found that the CRA did not make a decision with that degree of precision until October 2005. This decision was communicated to PSAC on November 25, 2005.

[15] He found that the CRA had acted appropriately in briefing the representatives of the bargaining agent immediately following the announcement of the expenditure review. He

concluded that the CRA had met its obligations under the WFA Appendix to the collective agreement.

III. Submissions

i) The Applicant

[16] The Applicant submits that the decision should be set aside because the Adjudicator effectively rewrote the collective agreement by introducing conditions precedent that are inconsistent with the clear language of the definition of work force adjustment in section 1.1.9 of the WFA Appendix. In doing so, the Applicant says that the Adjudicator committed a reviewable error.

[17] According to the Applicant, the CRA's obligation under the WFA Appendix was triggered in February 2005 when the CRA informed its employees of its decision to eliminate cash counter services and rationalize enquiries counter services. The term "decision" is not defined in the WFA Appendix, and according to the Applicant, the word must be given its ordinary meaning, according to the context in which it is used.

[18] The Applicant submits that the definition of the WFA Appendix supports the view that "decision" means a determination by the Commissioner about a course of action that he is going to take. The collective agreement specifies that the "decision" must result in a loss of jobs beyond a specified date. That occurred on February 24, 2005 when the Commissioner announced that he was going to undertake the following:

- i. reduce client services delivery costs through the phasing out, over several years, of counter services for cash payments;
- ii. reduce client services through the consolidation of call centres and rationalization of counter services for enquiries; and
- iii. reduce fewer than 100 full-time equivalents in headquarters and in regions in the 2006-2007 fiscal year (cash counters) and reduce approximately 200 full-time equivalent positions by the 2007-2008 fiscal years (enquiries counter).

[19] The Applicant argues that this is a decision by the Commissioner that meets the requirements of the collective agreement, that is, it is a choice of a course of action to meet the reduction in the CRA's operating budget that would result in the loss of positions at the cash and enquiries counters in the 2006-2007 and 2007-2008 fiscal years.

[20] The Applicant characterizes the WFA Appendix as a job security provision that provides employees with a guarantee of a reasonable job offer or access to a bundle of rights in the event of a management decision to eliminate positions.

[21] The Applicant submits that the Adjudicator erred when he failed to consider the purpose of the WFA Appendix. Specifically, the Applicant argues that the Adjudicator erred by relying on section 2.1.1. of the WFA Appendix as the basis for imposing conditions precedent to the triggering of the CRA's obligations to notify PSAC of a WFA situation. It submits that section 2.1.1, when

read in the context of the policy's purpose, comes into play after a decision has been made by the Commissioner that jobs will be lost.

[22] The Applicant argues that the Adjudicator erred in finding that the CRA's obligations were not triggered until it had completed review of its decision with respect to cash and enquiries counters and identified specific work locations, positions and the dates for elimination of positions. It submits that the Adjudicator's interpretation of the collective agreement imposed requirements that the parties had not bargained for and that the Adjudicator effectively rewrote the terms of the collective agreement, contrary to section 229 of the PSLRA.

ii) The Respondent

[23] The Respondent submits that the Adjudicator did not err in concluding that the Commissioner did not make a decision until some time in October 2005 and that the requirements under the WFA Appendix became operative after that time. He argues that the Applicant is attempting to establish a co-management role that is not contemplated by the collective agreement. The Respondent submits that the ability of the CRA to determine its human resources requirements in a business-like manner is unfettered by the WFA Appendix.

[24] The Respondent notes that the Applicant bears the evidence of demonstrating a breach of the collective agreement. He submits that the Adjudicator properly characterized the issue before him as follows:

... the simple issue to determine in this policy grievance is when the collective agreement obligation to advise and consult with the PSAC on a WFA situation commences.

[25] Section 51 of the *Canada Revenue Agency Act*, S.C. 1999, c. 17 affords wide managerial authority to the CRA. The Respondent argues that section 6 of the collective agreement provides that the CRA's managerial authority is restricted only as specifically provided for by the collective agreement. According to the Respondent, the Applicant carried the burden of identifying the specific limitation in the collective agreement and for showing that the limitation was violated.

[26] The Respondent submits that there is nothing in the collective agreement to create a co-management situation between PSAC and the CRA. The authority to declare employees affected then lies wholly with the CRA. The rights set out in the WFA Appendix are available only when such a decision is made.

[27] Further, the Respondent argues that there is nothing in the collective agreement to prevent the CRA from communicating with the Applicant in the period before a decision is made. That is what happened in this case.

[28] The announcement by the Government of Canada about forthcoming expenditure cuts was not a decision of the Commissioner. It was not until the Commissioner's announcement on June 17, 2005 that work could begin in determining the number and identity of the employees who would be affected. In his decision, the Adjudicator found that "the impact on positions and their locations

was not known until sometime in October 2005.” The Respondent submits that the Commissioner did not make a decision until October 2005 and there is nothing in the record to show that this finding of fact was patently unreasonable.

IV. Discussion and Disposition

[29] This application raises two issues. First, what is the applicable standard of review. Second, did the Adjudicator err by concluding that no decision that engaged the notice provision of the WPA Appendix was made until October 2005?

[30] The first matter to be addressed is the applicable standard of review. Both parties argued that the applicable standard of review is patent unreasonableness. However, further to the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, that standard of review is no longer in play and decisions of administrative decision-makers are to be reviewed upon either the standard of correctness or that of reasonableness.

[31] The decision of the Adjudicator involves interpretation of a collective agreement. That is a matter falling within his specific mandate and expertise. I conclude that the appropriate standard of review in this case is reasonableness.

[32] In the first place, I am satisfied that the Adjudicator properly identified the matter in dispute, that is the timing of the commencement of the CRA’s obligations under the collective agreement to engage in the process of advising and consultation with the PSAC when a WFA situation occurs.

[33] The WFA Appendix contains definitions. The following definitions are relevant:

“affected employee” – is an indeterminate employee who has been informed in writing that his or her services may no longer be required because of a work force adjustment situation.

“work force adjustment” – is a situation that occurs when the Commissioner decides that the services of one or more indeterminate employees will no longer be required beyond a specified date because of a lack of work, the discontinuance of a function, a relocation in which the employee does not wish to relocate or an alternative delivery initiative.

[34] Section 1.1.9 of the WFA Appendix is found in the section dealing with “Roles and Responsibilities” and provides as follows:

1.1.9 The CRA shall advise and consult with the PSAC representatives as completely as possible regarding any work force adjustment situation as soon as possible after the decision has been made and throughout the process and will make available to the PSAC the name and work location of affected employees.

[35] Section 2.1 deals with official notification by the CRA upon the occurrence of WFA situation involving ten or more employees as follows:

2.1.1 In any work force adjustment situation which is likely to involve ten or more indeterminate employees covered by this Appendix, the CCRA shall notify, under no circumstances less than 48 hours before the situation is announced, in writing and in confidence, the PSAC. This information is to include the identity and location of the work unit(s) involved; the expected date of the

announcement; the anticipated timing of the situation; and the number of employees, by group and level, who will be affected.

[36] Section 51 of the *Canada Revenue Agency Act* clearly states that the CRA exercise management responsibility in the assignment of work to its employees. Section 51 provides as follows:

<p>51.(1) The Agency may, in the exercise of its responsibilities in relation to human resources management,</p> <p>(a) determine its requirements with respect to human resources and provide for the allocation and effective utilization of human resources;</p> <p>(b) determine requirements for the training and development of its personnel and fix the terms and conditions on which that training and development may be carried out;</p> <p>(c) provide for the classification of Agency positions and employees;</p> <p>(d) determine and regulate the pay to which persons employed by the Agency are entitled for services rendered, the hours of work and leave of those persons and any related matters;</p> <p>(e) provide for the awards that may be made to persons employed by the Agency for outstanding performance of</p>	<p>51. (1) L'Agence peut, dans l'exercice de ses attributions en matière de gestion des ressources humaines :</p> <p>a) déterminer les effectifs qui lui sont nécessaires et assurer leur répartition et leur bonne utilisation;</p> <p>b) déterminer les besoins en matière de formation et perfectionnement de son personnel et en fixer les conditions de mise en oeuvre;</p> <p>c) assurer la classification des postes et des employés;</p> <p>d) déterminer et régler les traitements auxquels ont droit ses employés, leurs horaires et leurs congés, ainsi que les questions connexes;</p> <p>e) prévoir les primes susceptibles d'être accordées aux employés pour résultats exceptionnels ou réalisations méritoires dans l'exercice de leurs fonctions, ainsi que pour des inventions ou des idées pratiques d'amélioration;</p>
--	---

their duties, for other meritorious achievement in relation to those duties and for inventions or practical suggestions for improvements;

(f) establish standards of discipline for its employees and prescribe the financial and other penalties, including termination of employment and suspension, that may be applied for breaches of discipline or misconduct and the circumstances and manner in which and the authority by which or by whom those penalties may be applied or may be varied or rescinded in whole or in part;

(g) provide for the termination of employment or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed by the Agency and establish the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part;

(h) determine and regulate the payments that may be made to Agency employees by way of reimbursement for travel or other expenses and by way of allowances in respect of expenses and conditions arising out of their employment; and

f) établir des normes de discipline et fixer les sanctions pécuniaires et autres, y compris le licenciement et la suspension, susceptibles d'être infligées pour manquement à la discipline ou inconduite et préciser dans quelles circonstances, de quelle manière, par qui et en vertu de quels pouvoirs ces sanctions peuvent être appliquées, modifiées ou annulées, en tout ou en partie;

g) prévoir, pour des motifs autres qu'un manquement à la discipline ou une inconduite, le licenciement ou la rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur et préciser dans quelles circonstances, de quelle manière, par qui et en vertu de quels pouvoirs ces mesures peuvent être appliquées, modifiées ou annulées, en tout ou en partie;

h) déterminer et régler les indemnités à verser aux employés soit pour des frais de déplacement ou autres, soit pour des dépenses ou en raison de circonstances liées à leur emploi;

i) prendre les autres mesures qu'elle juge nécessaires à la bonne gestion de son personnel, notamment en ce qui touche les conditions de travail non

(i) provide for any other matters that the Agency considers necessary for effective personnel management, including terms and conditions of employment not otherwise specifically provided for in this subsection.	prévues de façon expresse par le présent paragraphe.
Commissioner's responsibility:	Licenciement, suspension, etc., par le commissaire :
(2) The Commissioner must apply the penalties, including termination of employment and suspension, under paragraph (1)(f) and provide for termination or demotion under paragraph (1)(g) on behalf of the Agency. 1999, c. 17, s. 51; 2003, c. 22, s. 98.	(2) Le commissaire, pour le compte de l'Agence, inflige les sanctions, y compris le licenciement et la suspension, visées à l'alinéa (1) f) et procède au licenciement ou à la rétrogradation visés à l'alinéa (1) g). 1999, ch. 17, art. 51; 2003, ch. 22, art. 98.

[37] The issue before this Adjudicator was the timing of the event that engaged the WFA Appendix. He determined that the triggering event was the decision of the Commissioner that was made in October 2005.

[38] The Adjudicator found that before the notice provisions of the WFA Appendix were engaged, the CRA must have made a decision with enough precision to identify the work locations, the positions that will be affected and the date on which those provisions will be affected. He decided, on the basis of the evidence, that such a decision was not made until October 2005. The decision was communicated to the Applicant on November 25, 2005.

[39] This decision is reasonable, having regard to the evidence that was submitted to the Adjudicator. The decision of February 2005 concerning budgetary cuts was made by the Government, not by the Commissioner. In *Public Service of Canada v. Canada (Canadian Food Inspection Agency)* (2005), 343 N.R. 334 at para. 25, the Federal Court of Appeal noted as follows:

In this case, the President of the CFIA did not decide. The decision to consolidate various government functions under the authority of the CBSA was made by the Governor-in-Council under the authority of the PSRTDA.

[40] The Adjudicator reasonably concluded that the WFA Appendix notice provision was not engaged until the decision was made in October 2005. There is no basis for judicial intervention and this application is dismissed with costs.

JUDGMENT

This application for judicial review is dismissed with costs.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-832-06

STYLE OF CAUSE: **PUBLIC SERVICE ALLIANCE OF CANADA v.
ATTORNEY GENERAL OF CANADA**

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: October 9, 2007

**REASONS FOR ORDER
AND ORDER:** HENEGHAN J.

DATED: April 15, 2008

APPEARANCES:

Andrew Raven FOR THE APPLICANT

Richard Fader FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raven Cameron Ballantyne & Yazbeck LLP FOR THE APPLICANT

John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Ontario FOR THE RESPONDENT