

Federal Court



Cour fédérale

Date: 20090616

Docket: T-791-08

Citation: 2009 FC 635

Montréal, Quebec, June 16, 2009

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

RENÉ LAMY AND FRANCIS PICHON

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The applicants are seeking judicial review of a decision dated April 14, 2008, by an adjudicator under section 92 of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (Act), dismissing their grievances on the ground that they did not substantially perform the duties included in their new work description before June 21, 2002, and that consequently their pay could therefore not be adjusted retroactively to an earlier date.

II. Facts

Overview

[2] At the time they filed their grievances, on December 23, 2003, the applicant René Lamy held a project manager position (AR-05) at the Department of Public Works and Government Services (DPWGS), while the applicant Francis Pichon held a technical capital-asset advisor position (EN-ENG-04) in the DPWGS. The grievances contested the relevant date of retroactivity to which the applicants were entitled following the reclassification of their positions to a higher level.

[3] This reclassification was a direct result of the new duties and responsibilities that the employer added to the new work description approved in August 2003. The applicants maintain that retroactivity should go back to 1995, whereas the employer agreed to grant it only as of their request for reclassifying their positions, that is, as of June 21, 2002.

[4] Despite the applicants' submissions, it seems, according to the evidence accepted by the adjudicator, that the applicants had not been performing the new duties or responsibilities included in their new work description before June 21, 2002.

Background

[5] Starting in 1998, at the initiative of the Treasury Board Secretariat (TBS), the employer put a lot of effort into implementing the Universal Classification Standard (UCS) in order to standardize positions across the country. During this process, the applicants could not file a grievance in order to have their jobs reclassified to a higher level.

[6] It was after having distributed the draft of a new UCS work description that the TBS finally announced, in May 2002, that it was abandoning it; however, it subsequently consented, at the request of the employees, to re-evaluate their work classification on the basis of generic work description 0212105A developed in the context of the UCS.

[7] The August 22, 2003 decision on the reclassification of the applicants' positions was based as much on generic work description 0212105A as it was on data from the questionnaire completed by the applicants and the analysis done by the classification officer.

[8] The goal of the new work description developed in the context of the UCS was to standardize work descriptions in the various regions of the country. Employees were assigned new responsibilities; at the same time, they were given increased mobility. The generic aspect of this work description made it possible to include a number of activities. This description was more varied than previous descriptions. It was intended for project management professionals and clearly indicated the duties as a whole that were assigned to them.

[9] According to the evidence produced before the adjudicator, who had to confirm, on August 22, 2003, the reclassification of the applicants' positions, the reclassification included new work assignments and responsibilities that were additional to generic work description 0212105A.

III. Impugned decision

[10] The adjudicator's dismissal of the grievances relied on the following reasons:

- a. The facts of the case did not justify the modification of the effective date of the reclassification of the positions in dispute;
- b. The applicants waited too long to request a reclassification and file their grievances; in fact, if they really felt aggrieved, instead of remaining inactive, they should have acted eight years before the date chosen to file their grievances;
- c. Contrary to their submissions, the applicants had not been performing the duties of their positions as reclassified in August 2003 since October 1, 1995, and had not been substantially exercising the duties of work description 0212105A before June 21, 2002;
- d. With respect to continuous grievances, in any event, acting pay would not exceed the period of 25 days preceding the date of the filing of the grievances; in this case, the employer had already granted 14 months of retroactivity.

IV. Issues

[11] Was the adjudicator unreasonable in his assessment of the facts and reasons, which resulted in the dismissal of the grievances?

V. Analysis

A. *Standard of review*

[12] The parties agree that, in light of the adjudicator's expertise and the nature of the issues, a high degree of deference must be granted to his decision; the standard of review is therefore that of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12).

B. *Duties and responsibilities of the applicants*

[13] The applicants maintained that the new work description did not bring fundamental changes to their duties; however, the evidence produced before the adjudicator did not convince him that, in concrete terms, the new work description did not impose new duties and more responsibility on them and that the very nature of some of their duties remained substantially unchanged.

[14] Mr. Lamy maintained that his duties only changed inasmuch as, in 1995, the DPWGS decided to transfer his responsibilities to the band councils so that Aboriginal communities could play a more active role; however, since then, his duties have stayed completely unchanged.

[15] For his part, Mr. Pichon also maintained that his duties have stayed the same since October 1, 1995, and that the new work description did not add anything significant to his duties.

[16] However, the adjudicator noted in his decision that generic work description 0212105A differs significantly from previous work descriptions. He pointed out that, in order to standardize the

applicants' work description with that of their colleagues in other regions, the Department not only added duties, but also increased the level of responsibility of their duties. In truth, it was apparent even in the arguments relating to their grievances before the adjudicator that the applicants were still not performing all of the duties set out in their new work description; this fact was obvious to the adjudicator and he noted the discrepancies between the new work description and previous work descriptions.

[17] In short, it was up to the adjudicator to assess the facts and the applicants did not succeed in persuading the Court that, in light of his analysis of the facts, it was unreasonable on his part to find, for the reasons stated in his decision, that, as of 1995, the applicants had not substantially performed the new duties of the positions included in the new work description at the basis of the 2003 reclassification.

[18] Even though the applicants contested the view that their new work description resulted in fundamental changes to their duties, given the evidence produced before the adjudicator, he was at liberty to find that the new work description at the basis of their reclassification included not only new duties, but also an increased level of responsibility.

[19] All of these modifications of duties were developed in 2002 and approved in 2003. Even supposing that the duties that they performed did not really change with the new work description, this does not in any way mean that they must be reclassified retroactively to October 1, 1995 (*Cairns v. Treasury Board (Minister of Citizenship and Immigration)*, [2006] C.P.S.L.R.B. No. 131).

[20] With respect to the retroactive pay claimed on the basis of a higher salary scale for a higher level of work performed since 1995, the applicants had to demonstrate that, since then, they had substantially performed the new responsibilities stemming from the reclassification of their positions. Given the evidence produced, the adjudicator was able to state, unequivocally, that the applicants had never, before this reclassification, assumed certain duties that it added to their positions in August 2003, for example: fund management, project delivery, results-oriented management and contract management.

[21] In short, the applicants were performing, before the new reclassification of their positions, the duties stated in their former work description. Even though these duties can be found in their new work description, it is well to recall the fact that it added new responsibilities, hence the reclassification of their positions to a higher level.

[22] Therefore, it follows that it was not unreasonable for the adjudicator to find that the applicants were not performing, from 1995, the duties stated in the 2003 description and for which they sought retroactive pay.

C. Acting pay

[23] Alternatively, the applicants maintain that the adjudicator committed an error of law in his interpretation of the case law concerning acting pay. They claim that the adjudicator incorrectly

found that the applicants could not claim acting pay for a period prior to that of the period set for filing the grievance.

[24] It should be recalled that, regardless of whether their grievances had merit, the employer nonetheless granted the applicants retroactivity starting from June 21, 2002, that is, the date when they actually requested the reclassification of their positions. Do they have the right to more? The answer is certainly no if they did not perform, as the adjudicator concluded, the new duties stemming from the reclassification of the positions.

[25] Since the Court finds that the arbitral award concerning the substance of the applicants' duties and responsibilities before the reclassification of their positions in 2003 was reasonable, this argument is completely moot because there was no violation of their rights, and thus they have no right to acting pay. If there had been such a violation, given its continuous nature, the Court does not see how the applicants would have been able to claim acting pay for the period preceding that provided for in the Regulations for the filing of grievances; and, in this case, subsection 71(3) of the Regulations limits this period to 25 days (*P.S.S.R.B. Regulations and Rules of Procedure* (1993), SOR/93-348).

VI. Conclusion

[26] For all of these reasons, the Court finds that the applicants did not establish that the impugned arbitral award was unreasonable. Their application for judicial review will therefore be dismissed with costs.

JUDGMENT

FOR THESE REASONS, THE COURT:

DISMISSES the application for judicial review, with costs.

“Maurice E. Lagacé”

Deputy Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-791-08

STYLE OF CAUSE: RENÉ LAMY and FRANCIS PICHON
v. THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: May 8, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** LAGACÉ D.J.

DATED: June 16, 2009

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