Federal Court  Cour fédérale

Date: 20110228

Docket: T-1717-09

Citation: 2011 FC 232

[REVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 28, 2011

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

CANADIAN UNION OF POSTAL WORKERS

Applicant

and

CANADA POST CORPORATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant, the Canadian Union of Postal Workers (the CUPW), has brought proceedings to have the respondent, the Canada Post Corporation (the CPC), condemned for contempt of court under Rules 466 to 469 of the *Federal Courts Rules*, SOR/98-106 (the Rules).

I. Background

[2] The parties are bound by a collective agreement. In February 2004, the CUPW filed a grievance that was allowed by Arbitrator André Bergeron (the arbitrator). The arbitrator rendered an initial award on September 16, 2008 and he rendered a second one on September 1, 2009, after the CUPW had brought the matter before him again to complete his first award.

[3] On October 21, 2009, the CUPW filed the two awards in question in the Court under section 66 of the *Canada Labour Code*, R.S. 1985, c. L-2, and Rule 242 of the Rules.

[4] Being of the opinion that the CPC was refusing to comply with the arbitrator's awards, the CUPW brought these contempt proceedings. First, it filed a motion under Rule 467 of the Rules for a show cause order naming the CPC's labour relations director. The CPC consented to this motion and an order was issued by Justice Beaudry requiring the labour relations director, Karen Casselman, to appear to hear proof that the CPC had disobeyed Arbitrator Bergeron's awards and to be prepared to present a defence.

[5] An initial hearing took place on October 21, 2010, in Ottawa. It was understood at the outset that the issue would be severed in two, that I would first deal with the issue of the CPC's guilt and that a second hearing would be scheduled to rule on the penalty if I were to find that the CPC was in contempt of court.

[6] After the CUPW completed its case, the CPC filed a motion for nonsuit, which I dismissed in the order *Canadian Union of Postal Workers v Canada Post Corporation*, 2011 FC 25. The hearing continued on February 7, 2011. The CPC chose to present a defence and it called Ms. Casselman as a witness.

[7] For the reasons that follow, I find that the CPC is not in contempt of court.

II. Awards on which the contempt proceeding is based

[8] The CUPW filed a grievance in which it alleged that the CPC had breached clause 37.01(a) of the collective agreement when it modified the Isolated Posts Vacation Travel Allowance Policy (the Policy) without its consent. This clause of the collective agreement reads as follows:

> **37.01 Conditions Not Covered**
>
> (a) The existing working conditions concerning the payment of a premium, the payment of an allowance or the payment of any other financial benefit that are not covered by this collective agreement shall remain in effect until such time as they are otherwise renegotiated between the parties.
>
> (b) The parties shall conduct meaningful consultation about any changes planned in other existing working conditions that are not covered by this agreement.

[9] The CUPW argued that before 2004, the Policy was based on the Treasury Board's Isolated Posts Directive (S-30), which included a provision that employees assigned to isolated posts and the members of their family, at the time of their annual leave, would receive an allowance equal to an economy class airline ticket without restrictions ("Y" class) for round-trip travel between their assigned post and the nearest major urban centre. Under the terms of this directive, employees could

apply the allowance to the type of trip of their choice and they received the amount of their actual expenses or the cost of a “Y” class airline ticket, whichever was lower. Employees could also receive a travel advance.

[10] The CUPW argued that in 2004, the CPC modified the Policy so that the conditions were less advantageous to employees because it no longer provided a travel allowance payment, but instead the payment of an annual lump-sum allowance, and because the amount of the allowance was lower than the amount employees had been receiving up to that point. In this respect, the CUPW claimed that the allowance was calculated based on the cost of the least expensive airline ticket for round-trip travel between the isolated post and the nearest urban centre, and not on the cost of a “Y” class airline ticket. Given that the CPC had modified the Policy without the CUPW’s consent, it was in breach of clause 37.01(a) of the collective agreement.

[11] The CPC claimed that the Policy, as it had always been applied, did not correspond to the Treasury Board’s Isolated Posts Directive (S-30), but rather to the CPC’s policy on unionized employee travel (E-1), and that it had not modified the Policy, but merely simplified its application.

[12] In the September 16, 2008 award, the arbitrator allowed the grievance and dismissed the CPC’s claims. He further decided that the Policy, in its pre-2004 version, corresponded to the Treasury Board’s Isolated Posts Directive (S-30) and not the CPC’s policy on unionized employee travel (E-1), and that by modifying the Policy without the CUPW’s consent, the CPC had breached clause 37.01(a) of the collective agreement.

[13] In his reasons, the arbitrator acknowledged that the CPC had the authority to modify the Policy for strictly administrative purposes by switching from an allowance system to a lump-sum payment system, but he indicated that this "simplification" could not result in a reduction of the financial benefits that had been available to employees up to that point. He found that the CPC had unilaterally modified the working conditions set out in the Policy and was in breach of clause 37.01(a) of the collective agreement.

[14] In the disposition of the award, the arbitrator ordered the CPC to modify its Policy to take into account the following two elements: the right of employees to receive, for themselves and their dependants, an allowance equal to the cost of a "Y" class airline ticket between their isolated post and the nearest urban centre, and the right for them to apply this allowance to the trip of their choice, including a package trip. The arbitrator also ordered the CPC to reimburse the employees for the amounts they would have received had the Policy recognized these two rights, and he retained jurisdiction over the amounts owing in the event of disagreement.

[15] The implementation of the award resulted in a disagreement between the parties. First, the parties did not agree on amounts owing to employees, but this disagreement is not relevant to the contempt proceeding because it is currently being argued before the arbitrator.

[16] Second, there was also a disagreement regarding the following components of the Policy. After the award was rendered, the CPC decided to return to an expense reimbursement process whereby employees would be entitled to an allowance equal to the cost of a "Y" class airline ticket or the employees' actual expenses calculated in accordance with the CPC policy on unionized

employee travel (E-1), whichever is lower. The CUPW objected to any reference to the policy on unionized employee travel (E-1). It claimed that, before 2004, employees received the cost of a “Y” class airline ticket or the amount of their actual expenses, whichever was lower, and that the actual eligible expenses were not subject to, or restricted by, the policy on unionized employee travel (E-1). The CUPW also alleged that the CPC no longer allowed employees to receive travel advances, whereas this practice was allowed before the 2004 modifications. The CUPW asked the CPC to modify these two components of the Policy, but it refused.

[17] Faced with this impasse, the CUPW again brought the matter before the arbitrator and asked him to complete the disposition of his award of September 16, 2008, so as to add an order compelling the CPC to modify the Policy to provide for the right of employees to receive a travel advance and to eliminate references to the policy on unionized employee travel (E-1) in calculating actual expenses. In support of its request, the CUPW argued that the arbitrator had failed to rule on some questions raised by the grievance and that he had jurisdiction to complete his award. The CPC objected to the motion, arguing that the arbitrator was *functus officio*.

[18] In the award rendered on September 1, 2009, the arbitrator allowed the CPC’s objection and dismissed the CUPW’s motion. However, he explained that he did not have to answer the CUPW’s questions because he had already implicitly ruled on these questions in his award of September 16, 2008.

III. Analysis

[19] The CUPW recognizes that it must prove beyond a reasonable doubt the three constituent elements of contempt: (1) the existence of the order, (2) the respondent's knowledge of the order and (3) the respondent's knowing disobedience of the award. It also acknowledges that case law requires that the order in question be clear, enforceable and unambiguous.

[20] It also argues that the following principles must guide the Court in its review of the order:

a. The order must be read and interpreted as a whole;

b. The Court must not interpret the order narrowly;

c. The Court must take the context into account;

d. The party that is the subject of an order must comply with the letter and the spirit of the order.

[21] The CUPW bases its argument on *Dursol-Fabrik Otto Durst GmbH & Co. v Dursol North America Inc*., 2006 FC 1115, 297 FTR 301, and *Nadeau Poultry Farm Limited v Groupe Westco Inc.*, 2010 CACT 2 (available on Quicklaw).

[22] It argues that the award of September 16, 2008, must be interpreted taking into account the award of September 1, 2009, and that it has all the necessary characteristics to give rise to contempt of court. Furthermore, it argues that the award of September 1, 2009, clarified the scope of the award of September 16, 2008 and that, in order to comply, the CPC must calculate the allowance amount based on the actual expenses incurred by employees and allow them to receive an advance.

[23] The CUPW is of the view that given that the CPC deliberately refuses to comply with the arbitrator's award, it must be found in contempt of court. It insists that it does not have to prove intent as defined in criminal law and that in the matter of contempt of court, evidence of conscious, knowing and intentional disobedience is sufficient, which, in its opinion, was amply demonstrated in this case. It bases its contention on *Apotex Inc. v Merck & Co. Inc.*, 2003 FCA 234, 227 DLR (4th) 106, *Louis Vuitton Malletier SA v Bags O'fun Inc.*, 2003 FC 1335, 242 FTR 75, *Canadian Private Copying Collective v Z.E.I. Media Plus Inc.*, 2007 FC 858, 160 ACWS (3d) 267 and *Canadian Private Copying Collective v Fuzion Technology Corp.*, 2009 FC 800, 349 FTR 303.

[24] The CPC does not interpret the scope of the arbitrator's award in the same way. It contends that the award of September 1, 2009, added nothing further to the award of September 16, 2008, and that it has complied with the orders issued in the award of September 16, 2008. The CPC also argues that the award of September 16, 2008, is more declaratory than enforceable and is ambiguous. The CPC also claims that the CUPW has used the contempt proceeding to put pressure on the CPC in order to expedite the outcome of the proceeding on the amount of damages. I am immediately rejecting this serious accusation, which is not supported by the evidence.

[25] Contempt proceedings are governed by Rules 466 to 469 of the Rules. The parameters applicable to civil contempt are well established in the case law. A contempt proceeding is a very serious matter that is quasi-criminal in character (*Bhatnager v Canada (Minister of Employment and Immigration)*, [1990] 2 SCR 217, 71 DLR (4th) 84, *ProSwing Inc. v Elta Golf Inc.*, 2006 SCC 52, [2006] 2 SCR 612). A party claiming that another party is guilty of contempt must prove beyond a

reasonable doubt the existence of an order, the other party's knowledge of the order and the other party's knowing disobedience of the order. The case law requires that the decision alleged to have been disobeyed must be neither ambiguous nor merely declaratory (*Telus Mobility v Telecommunications Workers CUPW*, 2004 FCA 59, 129 ACWS (3d) 76) [*Telus Mobility*].

[26] I am of the opinion that the arbitrator's awards have neither the scope nor the enforceability ascribed to them by the CUPW, even if I analyze them taking into account the context, letter and spirit of the awards. It is useful to reproduce the following passage from the award of September 16, 2008, in which the arbitrator summarized his thinking and discussed the evidence adduced:

> [TRANSLATION]
>
> [652] In summary, I have therefore come to the conclusion that the CPC was entitled, for strictly administrative purposes, to simplify the management of the vacation travel allowances granted to employees working in isolated posts, by replacing the process that had been used up to that point with the payment of an annual lump-sum allowance. However, this "simplification" was not, under paragraph 37.01(a) of the collective agreement, to result in a reduction of the financial benefits available to employees up to that point. In this case, the evidence revealed that, to maintain these benefits, the allowance would need to be equal to the cost of a "Y" class airline ticket for each employee and his or her dependants, for round-trip travel between the isolated post and the nearest major urban centre, on the date of the employee's choice, and that the employee would need to be entitled to apply this allowance to the type of trip of his or her choice, including package trips, from the departure point of his or her choice.

[27] In this paragraph, the arbitrator states the following two principles: (1) the CPC was entitled to modify its Policy for administrative purposes, but (2) this modification could not result in a reduction of the financial benefits available to the employees up to that point. The scope of this statement is sufficiently broad to cover all modifications made to the Policy resulting in a reduction

of financial benefits. However, the arbitrator limited the scope of his statement by indicating that the evidence had shown that there were two elements missing in the Policy in order to preserve the financial benefits available to employees: the right to an allowance equal to the cost of a “Y” class ticket and the right to apply the allowance to the type of trip of the employee’s choice.

[28] The disposition of the award reads as follows:

> [TRANSLATION]
>
> [653] For all these reasons,
>
> - I allow national grievance No. N00-03-00005;
>
> - I order the CPC to modify its vacation travel allowance policy in order to take into account:
>
> · the right of employees working in isolated posts to receive, for themselves and their dependants, an allowance equal to the cost of a “Y” class airline ticket (“Full Fare Economy Ticket”) for round-trip travel between their isolated post and the nearest major urban centre on the date of their choice;
>
> · the right of these employees to apply this allowance to the trip of their choice, including a package trip.
>
> - I acknowledge the CPC’s right to make the withholdings prescribed by law from these allowances;
>
> - I order the CPC to reimburse to the employees working in isolated posts, within fifteen working days following the date of this decision, any amount to which the latter would have been entitled had the policy implemented by the CPC recognized the above-mentioned rights, with interest at the statutory rate;
>
> - I retain my jurisdiction over the amounts owing, in the event of a disagreement between the parties.

[29] The disposition of the award is clearly limited to the two components mentioned at paragraph 652 of the award. The arbitrator ordered the CPC to modify the Policy in two specific respects: the right to an allowance equal to the price of a "Y" class ticket and the right of employees to apply that allowance to the trip of their choice. The disposition does not contain any order of more general scope that would, for example, require the CPC to maintain all the financial benefits arising under the Policy as it applied before 2004, or to reinstate the 2004 version of the Policy.

[30] It is precisely because the award of September 16, 2008 did not set out any conclusions regarding these two aspects that the CUPW asked the arbitrator to complete his first award.

[31] It is useful to reproduce the passage in the September 1, 2009 award in which the arbitrator states that he already implicitly answered the questions raised by the CUPW:

> [TRANSLATION]
>
> [32] If, as the Quebec Court of Appeal acknowledged in Contrôle Technique Appliquée, [*sic*] citing Justice Paré's comment, "*the reasons are equally as important as the disposition of a judgment if they are embodied in it and are essential to its support*", I could only – if I were to allow the CUPW's motion – repeat what I already said in my decision.
>
> [33] Prior to the modifications it made to its isolated post allowances in 2003, the CPC, as shown by communiqué S-14 issued by Glen Driedger, the compensation policy manager, applied the Treasury Board's Isolated Posts Directive, and therefore, under paragraph 37.01(a) of the collective agreement, could not modify the financial benefits that were available to employees working in isolated posts under this directive.
>
> [Emphasis added.]

[32] With respect, I consider that by refusing to add to the disposition of his award of September 16, 2008, the arbitrator did not provide a complete determination of the proceeding and did not extend the enforceability of his initial award. He did indicate that he thought he had implicitly answered the CUPW's requests, and he repeated the principle he had previously stated in the award of September 16, 2008, to the effect that the modifications made to the Policy could not have the effect of reducing the financial benefits that employees received prior to 2004. In my opinion, this finding is merely declaratory and not enforceable.

[33] I recognize the principle stated by the Quebec Court of Appeal in *Contrôle Technique Appliqué ltée v Québec (Attorney General)*, [1994] RJQ 939, 47 ACWS (3d) 621, to which the arbitrator refers. According to this principle, the reasons of a judgment may be used for the purpose of supporting the disposition. While it may be true that the reasons may be used to support a disposition, they cannot replace or be substituted for the disposition.

[34] In *Telus Mobilité*, the Federal Court of Appeal indicated, at paragraph 4, "[a] finding of contempt of court cannot be based on a court order that is ambiguous, or an order that is merely declaratory. It must be clear on the face of the order what is required for compliance" (see also: *L.C.U.C. v Canada (Canada Post Corp.)*, 8 FTR 93, 2 ACWS (3d) 279, *Canadian Union of Public Employees, Local 4004 v Air Canada*, 157 FTR 186, 84 ACWS (3d) 696, *C.U.P.W. v Canada Post Corp.*, 16 FTR 4, 8 ACWS (3d) 319).

[35] In the case at bar, the arbitrator's award of September 16, 2008, contained a very clear disposition which ordered the CPC to modify the Policy in a very specific way. This disposition did

not in any way specify how actual expenses were to be calculated or that employees were entitled to an advance. In any case, this latter element would have been completely incongruous, since the arbitrator clearly recognized the CPC's right to replace the allowance system with the payment of an annual lump-sum and the concept of an advance is incompatible with a lump-sum payment system.

[36] In the absence of a general order compelling the CPC to modify the Policy so as to preserve all the financial benefits arising from policy S-30, I believe that it is impossible, even in reading the additional award of September 1, 2009, to extend the scope of the award of September 16, 2008, to a point where it can be inferred that the arbitrator was also ordering the CPC to modify the Policy to specify that employees were entitled to receive an advance and have their actual expenses reimbursed. In my opinion, this would unduly add to the award of September 16, 2008, which the arbitrator himself refused to do by declaring himself to be *functus officio*.

[37] Moreover, the arbitrator acknowledged the limited scope of his award of September 16, 2008, when he invited the CUPW to file a grievance:

> [TRANSLATION]
>
> [34] These are the reasons that led me to the conclusions contained in my decision of September 16, 2008, and if, as the CUPW claims, the employer is not complying with this directive and "[t]he existing working conditions concerning the payment of a premium, the payment of an allowance or the payment of any other financial benefit that are not covered by this collective agreement" [par. 37.01a)] that it contains, it must file a grievance and not ask me each time to complete my decision in order to include a new aspect of the policy that, in its opinion, the employer has not complied with.
>
> [Emphasis added.]

[38] The remarks of Justice Cattanach in *International Brotherhood of Electrical Workers, Local Union, No. 529 v Central Broadcasting Co.*, [1977] 2 FC 78 (available on Quicklaw), appear to me to be entirely applicable to the case at bar:

> **58** …When the Board's order is filed and registered with this Court it is for the purpose of enforcement by the processes of this Court. Viewed realistically, even when filed and registered in this Court the order remains the order of the Board. Because the order of the Board is final and not subject to question or review by any court, except in accordance with section 28 of the Federal Court Act, it is not the function of a judge of the Trial Division to amend the order of the Board to make that order enforceable. The order of the Board, even when filed and registered under section 123, remains inviolate. That, in my view, is the clear intention of Parliament as expressed in section 122 of the Canada Labour Code. In my view, the proper forum in which to amend an order of the Board is the Board itself and I expressed that view, to which I still adhere, on several occasions to counsel for the applicant during the course of the hearing of the motion. It is not the function of the Trial Division to anticipate what the Board may have meant as expressed in its order and to substitute what it thinks the Board may have meant to do, but did not do, by amending the Board's order accordingly. To do so would be to usurp the function of the Board.
>
> …
>
> **82** If this Court is to punish a person for not carrying out an order of the Board, which, by virtue of section 123 of the Canada Labour Code, becomes an order of this Court for the purpose of enforcement when filed and registered, that order must direct what is to be done in clear and unambiguous terms and this, for the reasons I have given, the Board has failed to do.

[39] The CUPW argued that in his award of September 1, 2009, the arbitrator confirmed the enforceability of the award of September 16, 2008. That is true, but the enforceability of the decision cannot extend beyond its scope. The arbitrator’s comment was related to the conclusions of the award of September 16, 2008, and the jurisdiction he retained over the amount of damages:

> [TRANSLATION]
>
> [35] As for the decision I rendered on September 16, 2008, I find that, in light of the Isolated Posts Directive (S-30) used by the CPC in the past, it is perfectly enforceable and that if the parties do not come to an agreement on its application, they have only to ask me to intervene to determine the amounts owing.

[40] For all of these reasons, I consider that, having regard to the employees' right to receive an advance and have their travel expenses reimbursed on the basis of the actual expenses, the awards rendered by Arbitrator Bergeron do not have the enforceability necessary to give rise to a finding of contempt of court. The enforceability of the award is limited to the specific orders contained in the disposition of the award of September 16, 2008. And the evidence shows that the CPC has complied with the orders included in that disposition.

[41] The disposition of the award did not include the right to an advance and the reimbursement of travel expenses based on actual expenses. The arbitrator did state that the CPC could not modify the financial benefits arising from the Policy (in its pre-2004 version), but this component of the award is declaratory. I also consider that the award of September 1, 2009, is ambiguous. The arbitrator referred to certain passages of the award of September 16, 2008, and indicated that he already implicitly answered the questions raised by the CUPW, but he did not in any way indicate whether he considered that the evidence showed that, prior to 2004, the employees were entitled to an advance and that there was no limit placed on their actual expenses. Nor did he indicate whether he considered that these two elements were financial benefits within the meaning of clause 37.01(a) of the collective agreement. As indicated above, it is not for the Court to complete the award or to determine what the arbitrator meant.

[42] The CUPW has therefore not succeeded in showing beyond a reasonable doubt that the three constituent elements of contempt of court have been met and that the CPC must be condemned.

[43] In my view, the CUPW's best course of action for obtaining a determination that the CPC is still in breach of clause 37.01(a) of the collective agreement is grievance arbitration, as the arbitrator himself suggested.

ORDER

THE COURT ORDERS that the contempt proceeding be dismissed with costs to the Respondent.

"Marie-Josée Bédard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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