Date: 20111020

Docket: T-1344-11

Citation: 2011 FC 1207

Montreal, Quebec, October 20, 2011

PRESENT: The Honourable Mr. Justice Martineau

[ENGLISH TRANSLATION]

BETWEEN:

CANADIAN UNION OF POSTAL WORKERS

Plaintiff

and

CANADA POST CORPORATION
and
ATTORNEY GENERAL OF CANADA

Defendants

REASONS FOR ORDER AND ORDER

[1] The Canadian Union of Postal Workers (the Union) is asking me to order the Honourable Coulter A. Osborne, the arbitrator appointed by the Minister of Labour (the Minister) to draft the new collective agreement between the Canada Post Corporation (Canada Post) and the Union, to postpone the dispute arbitration and not take any action or make any decision as arbitrator for final offer selection until there is a final decision from the Court regarding the current application for judicial review.

[2] Labour relations arbitration in the federal enterprise sector as a dispute resolution mechanism is traditionally and operationally based on consent, with the arbitrator usually being chosen by the parties to the collective agreement or being acceptable to each of them. That is not the case in this instance. Here, arbitrator Osborne, a former judge now retired, whose name was not suggested by either of the two parties to the collective agreement, was appointed on July 22, 2011 by the Minister pursuant to section 8 of the *Restoring Mail Delivery for Canadians Act*, SC 2011, c. 17 (the Special Act). His mandate, under the Special Act, involves making a decision incorporating the final offer from Canada Post or the Union, which he will have selected and which will take effect immediately as the new collective agreement between the parties, until January 31, 2015, with the wage increases having already been set in the Special Act.

[3] Final offer arbitration already exists in other fields, including rail transportation, but appears to be used less for resolving labour relations disputes. However, the general principle is the same. Final offer arbitration eliminates the possibility for the arbitrator to choose a compromise position between the two offers, which can happen in traditional labour relations dispute arbitration. Thus, since the final offer can no longer be subsequently altered, final offer arbitration is designed to encourage the parties to resolve the dispute through their own negotiations or even, like here, to simultaneously make a final offer, without awareness of the other party's final offer. This, of course, involves very high risks on both sides.

[4] In this case, the proceedings before arbitrator Osborne have already been going on since late August 2011, but have still not reached an advanced stage. The Union first went to arbitrator Osborne to obtain a stay, but the latter decided to continue the case, given that there was some

urgency and that his mandate, in principle, was to expire on October 20, 2011. Arbitrator Osborne, who is aware of the existence of the application for judicial review, has not spoken on the Union's claim regarding his unilingualism as an arbitrator appointed under the Special Act (or about his qualifications).

[5] It should be pointed out that, under subsection 11(1) of the Special Act, unless a longer period was specified by the Minister, the parties had to, in principle, submit their final offers to arbitrator Osborne no later than October 20, 2011, which is today. The Union argues that, in view of the progress of the hearings before the arbitrator, the arbitrator will make his decision in mid to late January 2012. It is clear that Canada Post is putting tremendous pressure on arbitrator Osborne for this.

[6] I note that the final offers must contain only the clauses or parts of clauses that the parties have not already agreed on. On October 5, 2011, arbitrator Osborne had already ordered the parties to submit to him a list of resolved and unresolved matters in their view, no later than October 11, 2011---the date on which Canada Post submitted the list of unresolved matters according to the employer side, a list that the Union is contesting. The arbitrator began hearing the parties about this on October 18, 2011. At that time, other hearing dates were set by arbitrator Osborne for November, and will potentially be set for December 2011 and January 2012.

[7] The three parts of the test for obtaining an interlocutory injunction or a stay are well known (*RJR-MacDonald Inc v Canada (Attorney General)***,** [1994] 1 S.C.R. 311 at para. 179 (*RJR-MacDonald*)) and are cumulative. After hearing the parties' respective submissions, yet without

speaking on the merits of this application for judicial review, I am satisfied that there are serious issues to deal with in this case, that the Union has established the existence of irreparable harm and that the balance of convenience favours issuing rather than not issuing a stay order or interlocutory injunction, in consideration of the interests of the parties and of the public interest.

[8] In short, the Union intends to argue on the basis of merit that the Minister unreasonably exercised the power conferred on her by the legislator in not taking into consideration the qualities required of a person likely to be appointed arbitrator under section 8 of the Special Act, with respect to the very special and extraordinary mandate entrusted to him. The Union is challenging thelabour relations expertise of arbitrator Osborne, his acceptability to the parties, as well as his bilingualism.

[9] By the way, the application for judicial review also includes an application for order declaring the clause on prohibition of proceedings found in the Special Act to be constitutionally inoperative and unenforceable. At this stage, the representative of the Attorney General of Canada, who is also a party to the case, did not tell the Court whether the Minister actually intends to argue that section 12 thereof prevents the Court from reviewing the legality of her decision to appoint arbitrator Osborne. As for Canada Post's attorney, he already indicated that this is not the case in this instance and that the departmental decision is reviewable by the Court.

[10] First, the Union intends to plead that the departmental decision to appoint a unilingual anglophone judge as arbitrator for final offer selection is incorrect or unreasonable in that it completely disregards the almost constitutional bilingualism requirement of any federal court, except the Supreme Court of Canada, under the *Official Languages Act*, RSC 1985, c. 31 (4th

Supp.) (OLA). In fact, the Union intends to argue that the arbitrator appointed pursuant to section 8 of the Special Act is a "federal institution" and a "federal court" within the meaning of subsection 3(2) of the OLA. However, subsection 16(1) of the OLA requires that any federal court ensure that it hears the case in both official languages, without the assistance of an interpreter, when the parties have opted for the case to be conducted in both languages, which is the Union's wish here, which wants to have certain French-speaking witnesses heard and be represented by a lawyer who is French-speaking as well.

[11] Also, the Union intends to argue that, with the mandate entrusted to the arbitrator under the Special Act being adjudicative as well as quasi-statutory in nature, he must have an adequate command of English and French to be able to make his decision in both official languages. Recall that Canada Post is a Crown corporation subject to the obligations of the OLA, and its employees' language of work is French and English, which have equal value under the OLA. According to the Union, simply translating the collective agreement decided by the arbitrator does not meet the requirements of legal functional equivalence, and the consequence will be the creation of permanent doubt about the validity of the French version of various clauses in the new collective agreement, when the time comes to interpret the writer's actual intention. The Union notes that arbitrator Osborne is not currently able to settle disputes between the parties regarding the faithfulness and equivalence of the texts in the new collective agreement that will have to be submitted at the same time as the final offers. In this regard, the Union also invokes section 36.04 d) i) of the current collective agreement between the parties, which provides that the English and French texts have official value.

[12] The second serious issue raised by the Union involves arbitrator Osborne's labour relations expertise and the special purpose for which he was appointed. It must be remembered, the Special Act provides that the final offer selection must be made by the arbitrator based on such things as the need for working conditions that are consistent with those of comparable postal industries to ensure the economic viability and competitiveness of Canada Post, maintain the health and safety of its workers and the sustainability of the pension plan. Thus, the Union intends to argue before this Court that the power of appointment delegated to the Minister must be exercised for its intended purpose and be consistent with the objectives of the Special Act and that it being exercised cannot be made immune to judicial review. For this, the Union references *Canadian Union of Public Employees (CUPE) v. Ontario (Minister of Labour)*, 2003 SCC 29, in which the Supreme Court decided that such discretionary power is limited by the purpose and general nature of the Special Act, in that criteria such as the arbitrator's relevant expertise in labour relations, plus his/her independence, neutrality and general acceptance in the labour relations community must be taken into consideration; failing which the Minister's decision is voidable.

[13] Having reviewed all the written and oral submissions of the Union and Canada Post, it is unnecessary at this stage to decide on the merits of the arguments raised on each side. Given the minimal requirements in case law to satisfy the serious issue test, it is sufficient here to find that the issues raised by the Union are serious and that they are not frivolous or vexatious, which was actually admitted to the Court by the Attorney General of Canada's representative.

[14] As for the second part of the test, it involves determining whether the Union and its members will suffer irreparable harm if the current suspension order is not granted. Supreme Court

case law says that irreparable harm is that "which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other". It is also well established that the term "irreparable" refers to the nature of the harm suffered rather than its magnitude (*RJR-MacDonald*, cited above, at para. 59) and that the difficulty accurately calculating the damages does not constitute irreparable harm, as long as there is a *reasonably accurate* way to measure those damages (*Merck & Co v. Nu-Pharm Inc.*, [2000] FCJ 116 at para. 32).

[15] Having closely read the detailed affidavits and the documents submitted by the Union and Canada Post and having reviewed the parties' submissions, I am satisfied that the Union has a decisively established the existence of an irreparable harm. The evidence of harm is clear, and the harms alleged by the Union are neither hypothetical nor speculative like Canada Post claims they are. I also reject the argument that this stay motion was filed late or that it is premature.

[16] The Union is essentially alleging three harms of an irreparable nature.

[17] First, the Union alleges that it suffers irreparable harm in needing to have witnesses heard and to plead its case in a language that is not theirs. That harm, which is existing and real, will only worsen if the suspension order is not granted. Canada Post replies that it is not an irreparable harm, but merely a procedural inconvenience: one party can waive its fundamental right to be heard by a bilingual adjudicator if section 16 of the OLA ever applies. However, the Union participated in the first hearings held in English, and an initial francophone witness agreed to testify in English (to be sure he was well understood by arbitrator Osborne). The Union contends that its objection to arbitrator Osborne's unilingualism was raised at the first opportunity before the arbitrator and that it

is not by choice, but by obligation, that it is currently participating in the arbitration process in English, since the arbitrator refused to grant the Union's stay motion.

[18] From a language rights perspective, there is indeed an irreparable harm here. The Union is effectively disadvantaged by having to proceed with the arbitration, before arbitrator Osborne who is apparently a unilingual anglophone, in a language that it clearly did not opt for, especially since there will be no practical way for the parties and the Court to confirm later whether the translation provided at the hearing by the interpreter will have been faithful at all times. Thus, when the Union has francophone witnesses heard, the arbitrator will have to hear the testimonies via simultaneous interpretation, while the transcript will be written in French. Moreover, the Union's lead counsel argued that, even if it spoke English, the Union is disadvantaged by having to plead before the arbitrator in a language that is not its own. Assuming the Court would have to allow the application for judicial review, I am therefore of the opinion that it is a harm not measurable in dollars and cents. We would be talking about violation of languages rights, thus fundamental rights, for which there is no accommodation if section 16 of the OLA applies like the Union claims it does.

[19] Second, the Union alleges that, assuming the arbitrator's appointment is revoked by the Court at the outcome of the application for judicial review, the revealing of its final offers as part of the current arbitration will cause it irreparable harm because it will thereby have revealed its position and its entire strategy, a fact that can no longer be undone retroactively and is contrary to the very purpose of the Special Act. Canada Post maintains that this harm will also be shared by the employer side. Nonetheless, I note that this second stage of the test is solely about determining the plaintiff's harm. I am of the opinion here that, if the Union submits a final offer, it is in fact

revealing its entire strategy to Canada Post, which will then be able to use the Union's final offer to prepare its new final offer if the arbitration ever has to start over with another arbitrator. Once again, that harm is not financially compensable. In this case, it is entirely likely that Canada Post will submit its final offer to arbitrator Osborne before the current application for judicial review has been adjudicated on its merits by the Court. If the Union waits to learn the outcome of its application for judicial review and refuses to make a final offer, subsection 11(3) of the Special Act provides that the arbitrator will then select the other party's offer, which will become the new collective agreement. Therefore, the Union's harm is definite.

[20] Third, all parties before the Court agree that, if the departmental decision is overturned, arbitrator Osborne's decision, and hence the new collective agreement, will have no legal effect. The Union alleges that retroactively cancelling the final offer selected by the arbitrator as the new collective agreement will create a reality that is impossible to rectify, plus create chaos for years to come. Canada Post in turn maintains that any harm caused to the Union further to the overturning of a decision by arbitrator Osborne imposing measures pertaining to job security, the retirement plan, insurance coverages for retirees, staff movements and transfers or the annual vacation leave, will obviously be financially compensable and that the issue is premature, which the Union is strongly contesting. Having reviewed the employer's evidence in that connection (Mr. Mark MacDonell's affidavit and supporting documents), I nevertheless agree with the Union, specifically Sylvain Lapointe's testimony. The facts stated in Mr. Sylvain Lapointe's affidavits and the content of his examination are conclusive. By the very nature of some of the working conditions, not everything is financially compensable. I am of the opinion that restoring the status quo will be practically

impossible under the circumstances and that this, in itself, is an irreparable harm (*International Brotherhood of Locomotive Engineers v. Cairns*, [2000] ACF 112, 252 NR 160 (FCA).

[21] This now brings me to the third part of the test: the balance of convenience. The situation is very urgent, and it is important to resolve as soon as possible the issue of the legality of the departmental appointment of arbitrator Osborne. Thus, by means of a Court order made on September 22, 2011, the Union's application for judicial review will be heard on its merits on January 24 and 25, 2012 in Montreal. Therefore, today we are talking about a three-month suspension of the final offer arbitration process. Under the circumstances, this additional time will not place an excessive burden on the two parties to the collective agreement.

[22] I am of the opinion that the balance of convenience leans decidedly in favour of the Union and maintaining the status quo, time that the Court can hear the case on its merits. Canada Post says it suffers major losses (its profits would be only $400 million this year). This is why it is seeking significant concessions from the Union to be able to deal with the challenges of competition. In my view, the alleged economic disadvantages are instead closer to being a shortfall than actual losses. Canada Post's overall financial situation will remain the same for the next three months because, under the Special Act, it is the working conditions in the current collective agreement that apply during final offer arbitration. It should also be pointed out that no harm is done to the public if the arbitration is suspended because the Special Act already ensures that the people of Canada will be provided with postal services and that there can be no strike or lock-out.

[23] In closing, by granting the requested suspension, the Court is merely respecting the legislator's wish that a single final offer be submitted by each party. It is also in the interests of the parties that a situation of great uncertainty and instability be avoided, especially since the issues raised by the Union are serious and that the future working conditions of some 44,000 employees of the Corporation are at stake. It must also be remembered that the Special Act allows the parties to establish a new collective agreement outside the final offer arbitration process, such that they still have the option, between now and the hearing of this application for judicial review, to meet and attempt to resolve some of the outstanding matters in order to move things forward, without either side waiving its rights.

[24] For these reasons, the motion for suspension and for interlocutory injunction is granted.

ORDER

THE COURT ORDERS the Honourable Coulter A. Osborne to postpone the dispute arbitration and not take any action or make any decision as arbitrator for final offer selection, until there is a final decision from the Court regarding the Union's application for judicial review in the record before the Court.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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DATE OF REASONS:	October 20, 2011

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