Federal Court  Cour fédérale

Date: 20141125

Docket: T-1158-13

Citation: 2014 FC 1129

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 25, 2014

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

JEAN BELLEC

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant is challenging the legality of a final decision, dated May 22, 2013, of the Associate Assistant Deputy Minister of Public Works and Government Services Canada (Assistant Deputy Minister or decision-maker) rejecting his request for a salary adjustment retroactive to an AS-04 level, first, because his grievance was out of time, and second, because the applicant benefits from the appropriate salary protection – at the PR-OFE-06 level.

[2] The applicant today is challenging the impugned decision by arguing that the Assistant Deputy Minister committed reviewable errors by finding that the grievance was out of time and determining that it was without merit. The applicable standard of review in this case is reasonableness. Even if the decision-maker may have committed a reviewable error by dismissing the grievance because it was out of time – an issue that need not be decided today – no intervention is warranted in this case. For the reasons that follow, I am of the view that the decision to dismiss the grievance on the merits is reasonable.

[3] For the purposes of this application for judicial review, the Court can only consider evidence that was actually before the decision-maker, therefore the information and documents mentioned at paragraphs 15, 22, 25, 26, 29, 38, 70, 75 and 79 of the applicant's affidavit were not considered by the Court.

[4] The applicant is a federal public servant who was employed with the National Printing Bureau, which in 1990 became the Canada Communication Group [CCG]. In 1993, the CCG became a separate employer under Part II of Schedule I of the *Public Service Labour Relations Act*, SC 2003, c 22, s 2. Prior to this, working conditions, including pay and pay classification levels, were contained in the collective agreements concluded between the Treasury Board and the unions representing public servants employed in a department.

[5] In September 1993, CCG employees were notified that under a new positions classification plan, all positions would be converted into CG group positions, a group that existed solely at the CCG. In fact, on October 1, 1993, the applicant's position was converted into a

position classified at the CG-08 level. However, given that the applicant's salary at his former classification was higher than that of a CG-08, the applicant was able to benefit from salary protection at his former level and classification, in accordance with the CCG's *Salary Maintenance Policy*. The applicant claims that immediately prior to October 1, 1993, he had been employed in a position at a GT-04 level; having formerly held positions at the PR-OFE-06 level (1981-1991) and at the AS-02 level (1992). However, in the respondent's view, on October 1, 1993, the applicant was employed at the PR-OFE-06 level.

[6] The respondent's arguments rely on the evidence in the record. In fact, at the time of the collective agreement the applicant earned an annual salary of $44,102, which corresponded to the salary of a PR-OFE-06 level position. On October 1, 1993, the applicant saw his salary increase by 3% in accordance with the collective agreement – because he was a member of the former PR group, his salary increased to $45,425. Although the applicant had worked as an AS-02 and a GT-04 (whose salaries at the time were less than that of a PR-OFE-06), on October 1, 1993, he was nonetheless granted salary protection at a PR-OFE-06 level by his employer when his position was converted to a CG-8. At the time, no grievance was made to challenge the decision of the employer.

[7] In December 1996, the CCG ceded operations to an employer from the private sector. CCG employees were given a choice to either accept an offer of employment from the private sector employer or be declared surplus employees in the public service. In February 1997, the applicant chose the second option. He then became eligible for a priority appointment in the public service. But for which positions? That is the question.

[8] The Public Service Commission [PSC] is, in principle, responsible for staffing and appointments. It based its decision on the applicant's salary and his previous qualifications. The PSC determined that his CG-08 position was equivalent to the PR-OFE-06, AS-04, PG-03 and GT-04 groups and levels. The salaries of the four classification levels were comparable, even if there was some variation between them. With respect to the applicant's continued salary protection, the priority staffing notification of January 26, 1997, states: "This employee is a salary protected PR-OFE-06".

[9] Six months after having been declared surplus, the applicant had yet to find a substantive permanent position. On July 6, 1997, the applicant was placed on unpaid surplus status. On April 14, 1998, the Department of National Defence offered the applicant an indeterminate appointment to an AS-03 position, which the applicant accepted. Given that this was a lower-level position, his salary protection at the PR-OFE-06 level continued to apply.

[10] The letter of appointment contained the following terms:

> Your appointment will be at the AS 03 group and level which has a salary range of $38,079 to $42,486 per year. Your actual salary on appointment will be $45,425 […]
>
> In accordance with the Workforce Adjustment Directive provisions for surplus employees who accept a lower level position, you will continue to be paid at the PR-OFE-06 group and level until you are appointed to a position or refuse an offer of a position at your substantive group and level.

No grievance was filed by the applicant at that time to challenge the employer's decision to continue paying him a salary that was equivalent to that of a PR-OFE-06 level position.

[11] Starting in November 1999, the applicant accepted a secondment at Industry Canada. The Memorandum of Understanding between the home organization (National Defence) and the host organization (Industry Canada) indicated that during the secondment period, the applicant [TRANSLATION] "would remain at his current group and level" and that "the host organization shall reimburse the home organization the salary of the AS-04 group and level, which is the current level of the employee as of November 8, 1999". However, in actual fact, the applicant would continue to receive a salary equivalent to that of a PR-OFE-06 level position. In a grievance filed by the applicant a number of years later, he would cite this MoU and assurances allegedly given to him by the manager who had assessed him during his secondment, to claim a salary adjustment retroactive to his layoff that was equivalent to an AS-04 level position rather than a PR-OFE-06 level.

[12] In November 2000, given that the applicant still benefitted from reinstatement priority status, the PSC referred him to an AS-04 position at Public Works and Government Services Canada (Public Works), but the applicant preferred instead to accept another position at a lower level than the one he had been offered. In January 2001, the applicant received a letter of appointment to a PG-02 position indicating that his salary would be protected at the rate of pay of his substantive position at the time he was declared surplus in 1997. In fact, the applicant did indeed continue receiving a salary equivalent to that of a PR-OFE-06 level position. No grievance was filed at that time to challenge the amount of the salary he was receiving under salary protection.

[13] In July 2002, the applicant made a transfer request and claims that this was when he noticed that the amount of the protected salary he had been receiving since 1998 did not correspond to that of an AS-04 level. Thus, he took steps to address the issue with Public Works, contacting a human resources officer. The applicant's file with human resources remained under review until September 28, 2004; this was when the applicant was informed by the manager responsible that his level of salary protection would not be modified retroactively to a GT-04 or an AS-04 level.

[14] On October 8, 2004, the applicant filed a formal grievance. However, it would take another eight years before the applicant's grievance was reviewed and dismissed at the second level, on October 10, 2012, on the basis that it was out of time and that the applicant had not demonstrated that his salary had been protected at the AS-04 level in the past. The applicant's grievance was dismissed in a final, decisive manner (third level) on May 22, 2013, hence this application for judicial review.

[15] The decision-maker did not leave it at the fact that the grievance was out of lime, but reviewed the grievance on the merits. I find the impugned decision to be reasonable in this case. The refusal to grant salary protection retroactive to an AS-04 level is well reasoned and supported by the evidence. The reasons of the decision-maker are clear and intelligible, and the findings of the decision-maker do not appear gratuitous or arbitrary. Here is what the decision-maker had to say:

> [TRANSLATION]
>
> Notwithstanding the foregoing, I examined the merit of your grievance and reviewed all of the documentation submitted by yourself and your representative. None of the documents filed at

the hearing or later sent by email on April 26, 2013, indicate that you were appointed to an AS-04 group and level, nor that your salary was protected at that group and level. You indicated never having been appointed to an AS-04 position. I understand that the Public Service Commission (PSC) had referred you to positions at levels equivalent to your salary at the time (without that constituting a promotion) and that this salary corresponded to positions such as: AS-04, PG-03 and GT-04. However, the fact of being "referred to a position" does not mean that you were appointed to that group and level.

I further understand that the PR-OFE-06 position you held in the public service was converted to a CG-8, a group and level that existed solely with the separate employer that the Canada Communication Group (CCG) became in 1993. However, even at that time, when the positions were converted, your prior classification (at the PR-OFE-06 group and level) was taken into consideration in granting you salary protection at the PR-OFE-06 level under the CCG's *Salary Maintenance Policy*, as your PR-OFE-06 salary was higher than that of a CG-08, but lower than that of a CG-09.

Upon your return to the public service in 1998, the PSC used your protected salary as well as your classification prior to the conversion to CG-08 to establish equivalent positions in order to find you a new position in the public service. The Commission determined that you were at a PR-OFE-06 group and level and that your salary was also equivalent to that of an AS-04, a PG-03, a GT-04 and, obviously, a PR-OFE-06. I am of the view that such a determination is correct. Thus, you were not at an AS-04 group and level, but your salary was equivalent to that. Therefore, when DND offered you an AS-03 position, the letter of offer specified that your salary would remain that of a PR-OFE-06.

Between 1998 and 2001, the date of your appointment to PWGSC, you were never appointed to an AS-04 position. You never received any letter of offer to that effect.

At the time of your appointment to a PG-02 position in Michel Rancourt's Directorate in 2001, given that your salary was higher than that of a PG-02, you continued to be paid at the protected salary of a PR-OFE-06. Michel Rancourt was unaware of the details of your compensation file at the time of your interview. He knew only that the PSC was referring an employee whose salary was equivalent to that of an AS-04. Michel Rancourt did not appoint you to an AS-04 position. Nor could he change your salary

> protection, which had been adequately determined by the PSC since your reinstatement to the public service in 1998.
>
> I am of the view that your current salary protection is at the group and level it should be, namely, at the PR-OFE-06 group and level. [Emphasis in original.]

[16] This is not an appeal, but a judicial review. In my humble opinion, the dismissal of the grievance on the merits is an acceptable outcome having regard to the evidence in the record and the general line of reasoning followed by the decision-maker. While he had indeed held AS-02 (1992) and AS-03 (1998-2000) positions, the applicant never held, or was appointed to, an AS-04 position, and when he was employed with CCG and at the time he chose to become surplus, the applicant's protected salary was that of a PR-OFE-06 level position and not that of an AS-04. It must be understood that the level of salary protection is a different issue compared to priority staffing following a decision to declare an employee surplus. Even if, for the purposes of staffing, the CG-08 position was equivalent to PR-OFE-06, GT-04, AS-04 and PG-03 positions, it does not mean that the applicant was entitled to salary protection at all of these levels. Moreover, the April 1998 letter of appointment to the AS-03 position at the Department of Defence clearly indicates that the applicant is protected at a PR-OFE-06 level. I completely agree with the respondent that the Memorandum of Understanding and the so-called assurances given by the manager who had assessed the applicant when he was on secondment at Industry Canada, cannot modify the employer's prior decision to protect the applicant's salary at the level of a PR-OFE-06 position. On the basis of the documentary evidence before him, it was therefore reasonable for the decision-maker to conclude that the applicant benefitted from salary protection at the level of a PR-OFE-06.

[17] Thus, the present application for judicial review must fail. As a result, the respondent is entitled to costs.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed with costs.

"Luc Martineau"

Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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