Federal Court of Appeal | Cour d'appel fédérale

Date: 20151104

Docket: A-6-15

Citation: 2015 FCA 243

CORAM: **PELLETIER J.A.**
SCOTT J.A.
GLEASON J.A.

BETWEEN:

LISTUGUJ MI'GMAQ FIRST NATION COUNCIL,

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA,

Respondent

Heard at Ottawa, Ontario, on November 4, 2015.
Judgment delivered from the Bench at Ottawa, Ontario, on November 4, 2015.

REASONS FOR JUDGMENT OF THE COURT BY: GLEASON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on November 4, 2015).

GLEASON J.A.

[1] In this application for judicial review, the applicant seeks to set aside a portion of the remedial order contained in the December 10, 2014 decision of the Canada Industrial Relations Board [the CIRB or the Board]. In its decision, the CIRB determined that the applicant breached the duty to bargain in good faith, set out in paragraph 50(*a*) of the *Canada Labour Code*, R.S.C. 1985 c. L-2 [the *Code*], in failing to communicate its reasons for the refusal to ratify a tentative

agreement until the Board hearings and, even then, in adding a central reason for the refusal only in the evidence of one of its witnesses, which was given several months after the hearing commenced. This additional reason concerned an apparent desire by the applicant's Chief and Band Council to obtain the authority to summarily dismiss any bargaining unit member when a member of the First Nation was available and qualified for employment in a bargaining unit position.

[2] The CIRB issued a detailed remedial order that, among other things, required the applicant to provide the respondent with a written explanation of its position on the articles in the tentative agreement that it objected to and with its proposals for these articles, that the parties thereafter meet and resume bargaining, and that, if the parties did not reach agreement on article 5 related to Band preference after 60 days, the respondent could refer the matter to the Board, which would then issue an order pursuant to paragraph 99(1)(*b*.1) of the *Code* to provide for the settlement of this article via a binding method of resolution.

[3] The standard of review applicable to the Board's decision, including the remedy it selected, is reasonableness: *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369, [1996] S.C.J. No. 14 (QL) at paragraph 36 [*Royal Oak*].

[4] In its Memorandum, the applicant submits that the portion of the Board's order providing for the settlement of article 5 of the collective agreement via a binding method of resolution (if necessary) is unreasonable for four reasons: first, because it contradicts the objects and purposes of the *Code* and represents an unwarranted interference with the free collective bargaining;

second, because there is no rational connection between the complaint, the breach of the duty to bargain in good faith and the impugned portion of the order; third, because the portion of the order the applicant objects to violates the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; and, finally, because the impugned remedy is punitive in nature.

[5] We find no merit in any of these arguments.

[6] The Charter claim may be dismissed at the outset as the applicant failed to provide the requisite notice under section 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, failed to raise the issue before the CIRB and there is virtually no evidence in the record before us that relates to the Charter claim.

[7] As concerns the other grounds, paragraph 99(1)(*b*.1) of the *Code* affords the CIRB jurisdiction to direct a method of binding arbitration to resolve one or more terms in dispute where it finds a breach of the duty to bargain in good faith and "considers that [the remedy] is necessary to remedy the contravention or counteract its effects". This provision affords the CIRB broad discretion to issue precisely the type of order that it issued in this case. Moreover, as Justice Cory writing for the majority of the Supreme Court noted in *Royal Oak* at paragraph 58, in crafting remedies, the Board exercises "its expert knowledge and wide experience". A remedial determination like the one made in this case is therefore entitled to considerable deference.

[8] Here, we find nothing unreasonable in the impugned portion of the remedial order issued by the CIRB, believe that it is tied to the breaches the Board found and, as opposed to impairing collective bargaining, might actually have spurred the parties to reach agreement during the 60 days they were given. More specifically, as the respondent rightly notes, the applicant's position on article 5 is highly unusual and is one that it would be difficult for any trade union to ever agree to. Knowing this, and given the prospect of binding arbitration failing agreement, the remedial order issued by the Board may well have facilitated compromise and thus furthered the process of collective bargaining. In addition, the order was in no way punitive as it was directed towards the applicant's conduct in raising a new and highly contentious issue as an impediment to agreement, months after the tentative agreement was concluded.

[9] While the Board's reasons might have provided a fuller explanation of why it decided to exercise its discretion under paragraph 99(1)(*b*.1) of the *Code*, this does not render its remedial order unreasonable as reasons need not be perfect and must be read in light of the record before the Board, as the Supreme Court noted in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708. On the facts before the Board, there was ample basis for the remedy it awarded. The impugned portion of the Board's order is therefore reasonable.

[10] We accordingly would dismiss this application with costs.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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