Federal Court of Appeal  Cour d'appel fédérale

Date: 20230502

Docket: A-148-21

Citation: 2023 FCA 88

CORAM: **STRATAS J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

HEILTSUK HORIZON MARITIME SERVICES LTD. and HORIZON MARITIME SERVICES LTD.

Applicants

and

ATLANTIC TOWING LIMITED and THE ATTORNEY GENERAL OF CANADA

Respondents

Heard at Toronto, Ontario, on March 29, 2023.

Judgment delivered at Ottawa, Ontario, on May 2, 2023.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: STRATAS J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] The applicants, Heiltsuk Horizon Maritime Services Ltd. and Horizon Maritime Services Ltd., apply for judicial review of a decision of the Canadian International Trade Tribunal (the Tribunal) (File No. PR-2020-068) pursuant to sections 18.1 and 28 of the *Federal Courts Act*,

R.S.C. 1985, c. F-7. In their complaint before the Tribunal, the applicants contended that the Department of Public Works and Government Services (PWGSC) improperly allowed the respondent Atlantic Towing Limited (ATL) to substitute all four of the ship masters originally proposed in its winning bid with new masters, contrary to the criteria of the Request for Proposals (RFP) with respect to the replacement of individuals identified in the contract. The Tribunal determined that the applicants' complaint was not valid.

[2] Paragraph 7.46(a)(*i*) of the RFP specified that a successful bidder could only replace masters proposed in their bids where the bidder was unable to provide that individual's services. Paragraph 7.46(a)(*ii*) required the replacement individual to have "qualifications and experience that meet or exceed the score obtained for the original resource."

[3] The procurement process was undertaken by PWGSC on behalf of the Canadian Coast Guard (CCG), which required two emergency towing vessels on a time charter basis. In framing the RFP, PWGSC imposed both technical requirements and point-rated scoring systems on bidders. Under Mandatory Requirement 20 (MR 20), vessels had to be operated by a master with at least five years' experience in "ocean and emergency towing". Under Rated Requirement 24 (RR 24), bidders were given points based on the proposed masters' years of experience in ocean and emergency towing. The scale was capped at 18 points for masters with 10 or more years of experience.

[4] PWGSC's solicitation garnered seven bids, including bids from the applicants and ATL. PWGSC ultimately selected ATL as the winning bidder. All four of the masters in ATL's

original bid satisfied MR 20 and received the top score under RR 24, each having over 10 years' experience in ocean and emergency towing. Within a month of being awarded the contract, ATL proposed substitutions for all of the masters it had originally proposed in its bid. PWGSC and the CCG approved the substitutions.

[5] Upon reviewing the applicants' complaint regarding these substitutions, the Tribunal noted that its role was not to conduct its own evaluation of ATL's substitute masters, but simply to determine whether PWGSC's assessment of the masters under both MR 20 and RR 24 was reasonable (Reasons at para. 56). The Tribunal stated that its task in this regard was hindered by the lack of evidence, contemporaneous with the approval of the substitutions, to support the conclusion that the substitute masters complied with MR 20 and merited full points under RR 24.

[6] This was an accurate observation. Email correspondence between PWGSC and CCG officials reflected the concern that the failure to compare the rated requirements of the original masters with those of the substitute masters conflicted with Article 7.46 of the RFP, which required that substitute masters possess experience that meets or exceeds that of the masters originally proposed. One CCG official accepted that "the experience, knowledge and abilities [of the proposed substitute masters] meet the expectations," but acknowledged that he arrived at this conclusion "[w]ithout… comparison to the original records of the contract and just on assessment of the resumes provided" (Applicants' Application Record at p. 2223). Earlier in the email conversation, that same official had expressed his concern that the CCG's failure to evaluate the substitute masters' resumes in the same manner as it had evaluated the original resumes might "jeopardize the contract validity" (Applicant's Application Record at p. 2225).

[7] The Tribunal stressed that PWGSC "should have documented efforts to ensure that the substitute masters would meet the mandatory requirements and that they would receive equivalent scores to the original masters under the rated requirements" (Reasons at para. 60). Nonetheless, the Tribunal held that PWGSC had reasonably concluded that each of the substitute masters fulfilled MR 20 (Reasons at para. 49), and that all four substitute masters would have earned the same score under RR 24 as did the original masters (Reasons at paras. 57-58).

[8] The Tribunal reached this conclusion because the "litigation ha[d] allowed PWGSC to put forward evidence" in the form of the substitute masters' resumes, "as well as an explanation of the substitution process" (Reasons at para. 61). Thus, while no contemporaneous evidence existed that demonstrated compliance with MR 20 and full points under RR 24, the Tribunal ultimately determined, based on its own reading of the resumes, that the substitute masters were equivalent in experience to the original masters. The Tribunal expressed its disapproval with the lack of evidence justifying PWGSC's decision in its costs award (Reasons para. 61).

[9] The Tribunal highlighted that PWGSC had failed to disclose all relevant documents in its required Government Institution Report, including the email communications above (Reasons at para. 20). This prompted several rounds of submissions, following which the Tribunal issued a production order (Reasons at para. 67). The Tribunal noted that the respondent PWGSC had also unnecessarily designated documents as confidential and had "supported ATL's unfounded and unnecessary allegations that counsel for Heiltsuk Horizon had breached their confidentiality obligations" (Reasons at para. 67).

[10] Before this Court, the Tribunal's determination is assessed on a standard of reasonableness (*Heiltsuk Horizon Maritime Services Ltd. v. Atlantic Towing Limited*, 2021 FCA 26, 335 A.C.W.S. (3d) 312 at paras. 61-62).

[11] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain a decision maker (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 85 [*Vavilov*]). The reasons need not be works of perfection; some latitude must be given to account for the nature of the proceedings and a tribunal's general administrative procedures and practice. A reviewing court must be able to follow a thread of reasoning without "encountering any fatal flaws", and be satisfied that there is a line of analysis that that could reasonably lead the tribunal from the evidence to the conclusion that it reached (*Vavilov* at para. 102). But where it is not clear how a tribunal reached its decision, a reviewing court should examine the record before the decision maker to see if the basis for their reasoning is nonetheless apparent.

[12] In this case, there was no bridge between the evidence and the Tribunal's conclusion. The Court pressed counsel to show how, on the face of the resumes, a conclusion could be reached that all of the substitute masters met MR 20 and earned the top score under RR 24. They could not. Counsel contended that equivalency of experience could be inferred from the type of vessels on which the substitute masters had served, as described in their resumes. I disagree.

[13] The respondents rely on the affidavit of a CCG official, Henri Legros, which states that the first three substitutions were proposed on September 4, 2018, one month after the award of the contract. Mr. Legros states that on September 11, 2018, he reviewed the proposed substitute masters' resumes and was satisfied that they met MR 20 and scored full points under RR 24. On September 28, 2018, he received the resume of the fourth substitute master; the affiant gave his approval of this substitution on October 4, 2018.

[14] This affidavit warrants three comments.

[15] The affidavit was sworn on February 7, 2021, some two and a half years after the substitutions were proposed. No notes, memoranda or other evidence corroborates the existence of any comparative evaluation as required by Article 7.46. Because the only evidence suggesting that the CCG undertook a comparative evaluation is an affidavit sworn two years after the fact, without any corroborative evidence illustrating the CCG's approach, the affidavit cannot bridge the gap between the evidence before the Tribunal and its ultimate determination that PWGSC and the CCG had followed the RFP's framework for post-award resource substitutions.

[16] Second, I readily accept that an aspect of the resumes that is not apparent to a lay reader may be apparent to someone working in the field. However, the Legros affidavit does not explain or translate how or whether, when viewed through the eyes of an experienced or trained professional in the area, the resumes on their face met the criteria.

[17] Third, the Legros affidavit, in its tone and language, is argumentative and not simply descriptive. It reads as if it were the Attorney General of Canada's memorandum of fact and law. The affidavit, for example, ventures beyond an objective description of what happened in the evaluation process and becomes an exercise of advocacy, conveying a position on the merits of the legal issue (see *e.g.* Legros affidavit at paras. 28, 36-39), contrary to the instruction of this Court in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 116, 280 A.C.W.S. (3d) 229 [*Tsleil-Waututh*] with respect to the role and purpose of affidavit evidence (*Tsleil-Waututh* at para. 37).

[18] The second affidavit filed by the respondent ATL presents similar deficiencies. The affidavit of Gilles Gagnon, Vice President and General Manager of ATL, offers the opinion that the substitute masters satisfied MR 20 and earned full points under RR 24. There are two concerns here: first, this is improper opinion evidence (*Shoan v. Canada (Attorney General)*, 2020 FCA 174, 82 Admin. L. R. (6th) 1 at para. 4), and second, as an officer of ATL, Mr. Gagnon's opinion is irrelevant. It was only PWGSC's conclusion on equivalency that was in issue before the Tribunal. I add that other paragraphs of the Gagnon affidavit are argumentative, not reflecting the clinical expression of fact as should an affidavit (*Coldwater First Nation v. Canada (Attorney General)*, 2019 FCA 292, 312 A.C.W.S. (3d) 457 at para. 20; *Tsleil-Waututh* at paras. 37 and 42).

[19] These concerns, however serious, do not affect my proposed disposition of this application. The Tribunal did not, at least ostensibly, base its decision on the Legros affidavit or indeed rely on it in its reasons.

[20] While three of the resumes reference experience in “towing”, none refer specifically to “ocean and emergency towing”, which is the focus of the mandatory and rated requirements. The fourth resume, approved for substitution on October 4, 2018, does not mention towing at all. I note that the absence of the phrase “ocean and emergency towing” from the resumes of ATL’s proposed substitute masters lies in contrast to the express language of ATL’s original masters’ resumes, which all include clear reference to this exact term of art. The resumes also show gaps in employment and periods of shore-based work; whether and to what extent these features were taken into account, or should have been taken into account, remains an open question. Nothing in the Legros affidavit explains how the CCG responded to these apparent discrepancies in the substitute masters’ resumes.

[21] *Vavilov* instructs that, even if the outcome of a decision could be reasonable under different circumstances, it is not open to a reviewing court (or in this case, a reviewing tribunal) to disregard the flawed basis for a decision and substitute its own rationalization of the outcome (*Vavilov* at para. 96; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6 at paras. 26-28). Here, the Tribunal did the assessment that should have been done by PWGSC, in circumstances that required the Tribunal to make assumptions about the experience described in the resumes and conformity to the requirements of Article 7.46 of the RFP.

[22] Before closing, I turn to the argument advanced by ATL that the decision of PWGSC with respect to equivalency of the substitutions under paragraph 7.46(a)(*ii*) was a matter of contract administration and not contract procurement. This argument was rejected by the

Tribunal. A determination such as this is a matter within the expertise and mandate of the Tribunal, and I see no error in its reasons.

[23] The usual remedy upon granting applications for judicial review is to set aside the decision and return the matter to the tribunal for redetermination. However, remedies on judicial review are discretionary and there are circumstances where a court may depart from the usual practice (*Vavilov* at para. 142; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, [2021] 1 F.C.R. 374 at paras. 99-102; *Canada (Commissioner of Competition) v. Rogers Communications Inc.*, 2023 FCA 16, 477 D.L.R. (4th) 553 at para. 11).

[24] This is one of those cases. Given the limitations in the evidence before the Tribunal, only one result was open to the Tribunal and no purpose would be served in remitting the matter to it.

[25] I would therefore allow the application for judicial review with costs. I would set aside the decision of the Tribunal and declare the complaint valid.

"Donald J. Rennie"
J.A.

"I agree.
Stratas J.A."

"I agree.
Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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