Federal Court of Appeal | Cour d'appel fédérale

Date: 20230524

Docket: A-265-21

Citation: 2023 FCA 111

CORAM: **RIVOALEN J.A.**
ROUSSEL J.A.
GOYETTE J.A.

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

Applicant

and

SENATE OF CANADA

Respondent

Heard at Ottawa, Ontario, on May 16, 2023.

Judgment delivered at Ottawa, Ontario, on May 24, 2023.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: ROUSSEL J.A.
GOYETTE J.A.

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REASONS FOR JUDGMENT

RIVOALEN J.A.

[1] This is an application for judicial review of the arbitral award rendered on September 9, 2021 (2021 FPSLREB 103) by the Federal Public Sector Labour Relations and Employment Board (the Board) established pursuant to section 50 of the *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp) (the Act).

[2] In its decision, the Board rejected the applicant's proposal seeking a new appendix to the collective agreement between the bargaining unit composed of all employees of the Building Operations Section and the Material Management and Logistics Section (the bargaining unit) and the Senate of Canada. The proposal consisted of a Memorandum of Understanding that included a lump sum payment of $2,500 to each member of the bargaining unit for general damages to compensate for the stress, aggravation, and pain and suffering experienced related to the employer's implementation of the Phoenix pay system. The applicant justified the proposal in an attempt to mirror an agreement between tens of thousands of employees from the core public administration and the Treasury Board (2020 Phoenix settlement agreement).

[3] The parties agree that the standard of review of the Board's decision is reasonableness. The question before the Court is whether the arbitral award was reasonable within the meaning of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*].

[4] The applicant submits that the arbitral award is unreasonable and must be set aside. The applicant says that the Board rejected its proposal for the lump sum payment of $2,500 on the erroneous basis that it was not convinced that the implementation issues experienced by members employed by the Senate of Canada were sufficiently widespread to justify an award of damages when compared to the issues experienced by the employees of the core public administration.

[5] The applicant raises four principal arguments.

[6] First, the applicant submits that the Board failed to grasp the distinction that, in the 2020 Phoenix settlement agreement reached between the Treasury Board and the applicant, there was no requirement for the applicant's members to provide evidence of stress, aggravation, or pain and suffering related to a specific Phoenix-related pay problem in order to receive general damages of $2,500. According to the applicant, while the employees working at the Senate of Canada did not experience the same serious or widespread pay problems as those experienced by employees of the core public administration, they nonetheless experienced stress and should be entitled to the same damages award.

[7] Next, the applicant contends that the Board committed a retrospective parsing of the data that was before it. The applicant argues that at the relevant time, there was evidence before the Board that employees of the Senate of Canada experienced pay problems and that members of the bargaining unit would not have known whether those problems were associated with the Phoenix pay system.

[8] In addition, during oral submissions, the applicant took the Court to the record and relied on evidence from the Standing Senate Committee on National Finance that the impacts of the Phoenix pay system varied across departments of the core public administration and that those departments responded differently to the challenges. For example, Correctional Service Canada transferred its pay services to the Miramichi Pay Centre and experienced significant pay problems, whereas Statistics Canada retained its compensation advisors and was able to mitigate the problem associated with the Phoenix pay system.

[9] Finally, as it did before the Board, the applicant points to employees working for the Canada Revenue Agency (CRA) who received the lump sum payment of $2,500 without having experienced any Phoenix-related pay problems. The applicant argues that, in its analysis on this point, the Board improperly treated general damages as if they were part of total compensation.

[10] Going further, the applicant now stresses that the issue before the Board was whether the employees of the bargaining unit would have experienced the same stress, aggravation, or pain and suffering about the potential for serious pay problems that employees of the core public administration had experienced.

[11] I am of the view that the applicant's arguments cannot stand. I see no basis to conclude that the Board's decision was unreasonable.

[12] Under the judicial review framework set out in *Vavilov*, 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 the decision maker" (*Vavilov* at para. 85). The burden is on the party challenging a decision to show that it is unreasonable, a conclusion that requires showing that the decision contains a serious flaw. In addition, the reviewing court must refrain from reweighing and reassessing the evidence considered by the decision maker. Reviewing courts must also ordinarily refrain from deciding the issue that was before the decision maker and must respect the decision maker's role and expertise (*Vavilov* at paras. 75, 83, 100, 125).

[13] The Board, in this case, had wide authority—under the interest arbitration process—to resolve matters referred to it, determine the appropriate terms and conditions of employment, and impose those terms via a binding award. This Court has recognized that interest arbitrators are afforded wide discretion to settle the terms of the parties' collective agreement, and the decisions they make are almost always policy determinations and rarely involve legal issues. Additionally, this Court has recognized that the need for finality, which animates the need for deference in labour cases generally, is particularly acute in interest arbitration cases (*Laurentian Pilotage Authority v. Pilotes du Saint-Laurent Central Inc.*, 2018 FCA 117, 299 A.C.W.S. (3d) 235 at paras. 60–61, 63).

[14] As its reasons disclose, the Board took into account the factors set out in section 53 of the Act. It weighed the evidence and considered the proposals made by the parties. At paragraphs 82 to 85 of its reasons, the Board set out a coherent and rational basis for its decision to reject the proposal for a lump sum payment of $2,500 to each member of the bargaining unit. While the Board recognized that the employees of the Senate of Canada were not able to escape all the frustrations associated with the Phoenix pay system, it determined that the employer was responsive.

[15] Weighing all considerations, the Board acknowledged that it had more evidence before it on the Phoenix-related pay issues than a differently constituted Board had in its previous decision in *Public Service Alliance of Canada v. House of Commons* (2021 FPSLREB 45). However, the Board was not prepared to establish the precedent of matching the 2020 Phoenix settlement agreement in the arbitral award and did not accept that matching a damage award

designed to compensate employees for the specific problems that occurred in the Treasury Board's jurisdiction was justified by a comparability argument. The Board found that the applicant had not provided evidence of problems of similar or substantial extent to those experienced in the core public administration.

[16] The Board was not convinced by the situation of the CRA employees, noting at paragraph 84 of its reasons that these employees received a smaller general economic increase for 2020 than that awarded by the Board in its arbitral decision. It was within the Board's ambit to consider total compensation in conducting its comparability analysis with respect to the employees of the Canada Revenue Agency.

[17] In response, the evidence submitted by the respondent before the Board was that it implemented efficient and flexible mechanisms to mitigate against any negative impacts the Phoenix pay system caused to its employees.

[18] In addition, the respondent offered extensive reasons for opposing the lump sum payment proposal. It outlined the history of the Phoenix implementation in the core public administration and provided reasons why that history differed considerably from that experienced by employees of the Senate of Canada. The respondent noted that in the July 2018 report of the Standing Senate Committee on National Finance, the office of the Auditor General of Canada observed that in June 2017, there was over $520 million in outstanding pay for public servants due to errors caused by the Phoenix pay system. As of January 2018, there were 633,000 pay action requests pending, representing an increase of 28% from the data collected in June 2017.

[19] As previously mentioned, the Board considered and weighed the proposals from both sides, as it was required to do. There was no evidence before it that any of the applicant's members working at the Senate of Canada had experienced stress, aggravation, or pain and suffering from Phoenix-related pay problems, let alone problems of similar or substantial extent to those experienced by the employees of the core public administration.

[20] Furthermore, there was evidence before the Board of the grievances and lawsuits filed by employees of the core public administration because of the Phoenix-related pay issues, which culminated in the 2020 Phoenix agreement reached between the Treasury Board and the applicant. As part of that agreement, the applicant agreed to withdraw all related grievances, unfair labour practices, and litigation, and agreed not to support or pursue new litigation with regard to these matters.

[21] There was no evidence of any grievances or lawsuits commenced on behalf of members employed by the Senate of Canada.

[22] With all of this context in mind, and being of the view that the applicant has not met its burden, I cannot find that the arbitral award is unreasonable.

[23] I see no serious flaw in the Board's reasoning, based on the record that was before it and the positions taken by both parties in the arbitral dispute. The arbitral award is based on an internally coherent and rational chain of analysis that is justified in relation to the record and the Board's authority under the Act.

[24] The applicant is asking this Court to reweigh the evidence that was before the Board, which is not its role. I see no reason to intervene.

[25] For these reasons, I would dismiss the application for judicial review with costs.

"Marianne Rivoalen"
J.A.

“I agree.
Sylvie E. Roussel J.A.”

“I agree.
Nathalie Goyette J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	ROUSSEL J.A. GOYETTE J.A.
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