Federal Court of Appeal | Cour d'appel fédérale

Date: 20220425

Docket: A-13-21

Citation: 2022 FCA 69

CORAM: **STRATAS J.A.**
LOCKE J.A.
MACTAVISH J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2228

Respondent

Heard by online video conference hosted by the Registry on April 25, 2022.

Judgment delivered from the Bench at Ottawa, Ontario, on April 25, 2022.

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

Federal Court of Appeal  Cour d'appel fédérale

Date: 20220425

Docket: A-13-21

Citation: 2022 FCA 69

CORAM: **STRATAS J.A.**
LOCKE J.A.
MACTAVISH J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2228

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on April 25, 2022).

MACTAVISH J.A.

[1] The International Brotherhood of Electrical Workers, Local 2228 (IBEW) represents civilian electronic technologists working at the Department of National Defence. From time to time, these individuals participate in "sea trials", during which they conduct testing aboard naval

vessels. This requires irregular working hours during which the individuals are “captive” onboard. At issue between the parties is the calculation of overtime pay during sea trials.

[2] The relevant provision of the collective agreement in force between the IBEW and the employer at the time in question is Article 32.04, the full text of which is attached as an appendix to these reasons. In particular, Article 32.04(b) of the collective agreement provides that employees “shall be paid overtime at time and one-half (1 1/2) the employee’s straight-time hourly rate **for all hours worked in excess of the regularly scheduled hours of work up to twelve (12) hours**” [my emphasis]. Article 32.04(c) states that after this, “the employee shall be paid twice (2X) his or her straight-time hourly rate for all hours worked in excess of twelve (12) hours”. Also relevant is Article 32.04(d), which provides that “[a]fter this period of work, the employee shall be paid three (3) times his or her straight-time hourly rate for all hours worked in excess of sixteen (16) hours”.

[3] The employer and the union disagree as to the interpretation of the words “regularly scheduled hours of work” in Article 32.04(b). In particular, whether an employee’s regularly scheduled hours should be included in the 12 hours of work required to entitle the employee to overtime compensation for additional hours worked.

[4] In response to a policy grievance filed by the IBEW, the Federal Public Sector Labour Relations and Employment Board (FPSLREB) favoured the interpretation of Article 34.02 advanced by the IBEW. The Board found that an employee’s regularly scheduled hours are to be included in the 12 hours of work required to start earning overtime pay: *International*

Brotherhood of Electrical Workers, Local 2228 v. Treasury Board (Department of National Defence), 2020 FPSLREB 117.

[5] The employer submits that the Board erred in finding that the doctrine of *res judicata* did not apply, and in failing to follow an earlier Board decision endorsing the employer's interpretation of Article 34.02. Even if the Board did not err in refusing to apply the doctrine of *res judicata*, it should have found that the IBEW's grievance amounted to an abuse of process. The employer further submits that the Board failed to specifically engage with arguments made by the employer with respect to the interpretation of Article 34.02, that it unreasonably failed to consider principles applicable to the interpretation of bilingual collective agreements, and that it failed to consider the sea trial article as a whole.

[6] In a 2016 decision of the Public Service Labour Relations and Employment Board (the predecessor to the FPSLREB), the Board held that "regularly scheduled hours of work" were not restricted to the first day. Instead, any regularly scheduled hours during the course of the sea trial were paid at the straight time rate. As such, the 12-hour count in 32.04 referred to work done in excess of regularly scheduled hours, cumulatively, over the course of the sea trial: *Ducey v. Treasury Board (Department of National Defence)*, 2016 PSLREB 114 (*Ducey*). The IBEW did not seek judicial review of this decision.

[7] In 2017, the IBEW filed a policy grievance contesting the employer's interpretation of the collective agreement (as adopted by the Board in *Ducey*). The policy grievance raised two questions, only one of which is still in issue. That is, whether an employee's regularly scheduled

hours should be included in the 12 hours of work required to entitle the employee to overtime compensation for additional hours worked. The Board allowed the grievance, declaring that regularly scheduled hours worked are included in the 12 hours of work needed to entitle employees to overtime compensation.

[8] I agree with the parties that the standard of review to be applied in reviewing the Board's decision is that of reasonableness. Indeed, the interpretation of collective agreements is at the core of the Board's mandate: *Canada (Attorney General) v. Canadian Federal Pilots Association*, 2017 FCA 100 at para. 9.

[9] The doctrine of *res judicata* (and the related concept of issue estoppel) prevents litigants from raising issues that have been previously decided. For a matter to be *res judicata*, the second case must raise the same issue as the earlier case, it must involve the same parties (or their privies), and the first decision must be final: *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544.

[10] The Board was satisfied that the two cases raised the same issue, and that the *Ducey* decision was final. It found, however, that the parties were not the same: that the grievors in *Ducey* were individual employees, whereas the IBEW brought the grievance then before the Board.

[11] I accept that it is at least arguable that the IBEW was in fact a privy of the individual grievors in *Ducey*: *Danyluk v. Ainsworth Technologies*, 2001 SCC 44 at paras. 24-25. Even if the

Board erred in this regard, however, this does not render its decision unreasonable. Decision makers have the residual discretion to refuse to apply *res judicata*, even if the three elements of the test have been satisfied. Moreover, the Board went on to state that even if all of the elements of the test for *res judicata* had been established, there was ample jurisprudence holding that the doctrines against relitigation can be modified in labour matters: *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 SCR 616 at para. 5.

[12] Citing this Court's decision in *Canada (Attorney General) v. Bétournay*, 2018 FCA 230, the Board noted that it was not strictly required to conform or adhere to an arbitral consensus, and that it is not bound by other decisions of the Board. While a certain degree of consistency is desirable, departure from an arbitral trend is permissible, as long as the reasons for doing so are adequately explained: *Bétournay*, above at para. 51. This is consistent with the Supreme Court's more recent comments in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, which held that a decision maker can depart from established internal authority, but that it bears the justificatory burden of explaining that departure in its reasons, failing which the decision will be unreasonable: at para. 131.

[13] In this case, the Board explained clearly why it disagreed with the analysis in *Ducey*, and why it was coming to the opposite conclusion with respect to the interpretation of the relevant provision of the collective agreement. Its reasons for doing so went beyond a mere difference of opinion on a question of discretion, but went to an important issue with respect to the interpretation of bilingual texts. It provided a rational chain of analysis, noting, amongst other

things, that the Board in *Ducey* had not taken the French version of Article 32.04 into account in interpreting the provision in question.

[14] Insofar as the employer's abuse of process argument is concerned, the *Federal Public Sector Labour Relations and Employment Act*, S.C. 2003, c. 22, ss. 220(1) entitled the IBEW to bring policy grievances with respect to the interpretation of provisions of a collective agreement. I agree with the Union that it would be contrary to the wording of the legislation and the expectation of the parties to characterize a legislated entitlement as an abuse of process.

[15] The Board was not required to respond to every argument advanced by the parties, and it is clear from its reasons that it engaged in a meaningful analysis of the parties' submissions with respect to the significance of the French version of the collective agreement: *Vavilov*, above at paras. 91, 128. Its reasons are transparent, justified and intelligible in light of the facts and the law. Its conclusion is supported by an internally coherent and rational chain of analysis, and is within the range of possible outcomes. I am thus satisfied that the Board's interpretation of Article 32.04 was reasonable. I would therefore dismiss the application, with costs fixed in the all-inclusive amount of $3,500.00, as agreed.

"Anne L. Mactavish"

J.A.

APPENDIX

32.04 (a) He or she shall be paid at the employee's straight-time rate for all hours during his or her regularly scheduled hours of work and for all unworked hours aboard the vessel or at the shore based work site.

(b) He or she shall be paid overtime at time and one-half (1 1/2) the employee's straight-time hourly rate for all hours worked in excess of the regularly scheduled hours of work up to twelve (12) hours.

(c) After this period of work, the employee shall be paid twice (2X) his or her straight-time hourly rate for all hours worked in excess of twelve (12) hours.

(d) After this period of work, the employee shall be paid three (3) times his or her straight-time hourly rate for all hours worked in excess of sixteen (16) hours.

(e) Where an employee is entitled to triple (3) time in accordance with paragraph (d) above, the employee shall continue to be compensated for all hours worked at triple (3) time until he or she is given a period of rest of at least ten (10) consecutive hours.

(f) Upon return from the sea trial, an employee who qualified under paragraph 32.03(d) shall not be required to report for work on his or her regularly scheduled shift until a period of ten (10) hours has elapsed from the end of the period of work that exceeded fifteen (15) hours.

32.04 (a) L'employé-e est rémunéré-e au taux des heures normales pour toutes les heures prévues à son horaire de travail et pour toutes les heures non travaillées à bord du navire ou au lieu de travail sur terre.

(b) L'employé-e touche une fois et demie (1 1/2) son taux horaire normal pour toutes les heures travaillées en sus de son horaire normal de travail jusqu'à ce qu'il ou elle ait travaillé douze (12) heures.

(c) Après cette période de travail, l'employé-e touche le double (2) de son taux horaire normal pour toutes les heures effectuées en sus de douze (12) heures.

(d) Après cette période de travail, l'employé-e touche trois (3) fois son taux horaire normal pour toutes les heures effectuées en sus de seize (16) heures.

(e) L'employé-e qui a droit au taux triple (3) prévu à l'alinéa d) précédent continue d'être rémunéré-e à ce taux pour toutes les heures travaillées jusqu'à ce qu'il se voit accorder une période de repos d'au moins dix (10) heures consécutives.

(f) À son retour de l'essai en mer, l'employé-e ayant droit à la rémunération prévue à l'alinéa 32.03d) n'est pas tenu-e de se présenter au travail pour son poste d'horaire normal tant qu'une période de dix (10) heures ne s'est pas écoulée depuis la fin de la période de travail qui a dépassé quinze (15) heures.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-13-21
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2228
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	APRIL 25, 2022
REASONS FOR JUDGMENT OF THE COURT BY:	STRATAS J.A. LOCKE J.A. MACTAVISH J.A.
DELIVERED FROM THE BENCH BY:	MACTAVISH J.A.

APPEARANCES:

Joel Stelpstra Marylise Soporan	FOR THE APPLICANT
James L. Shields Sogol Naserian	FOR THE RESPONDENT

SOLICITORS OF RECORD:

A. François Daigle Deputy Attorney General of Canada	FOR THE APPLICANT
Shields Hunt Duff Strachan Ottawa, Ontario	FOR THE RESPONDENT