CITATION: CANADA (ATTORNEY GENERAL) *v.* CANADIAN MERCHANT SERVICE GUILD, 2009 FC 344, [2010] 2 F.C.R. 282 T-1200-08

Attorney General of Canada (*Applicant*)

v.

Canadian Merchant Service Guild (*Respondent*)

INDEXED AS: CANADA (ATTORNEY GENERAL) V. CANADIAN MERCHANT SERVICE GUILD (F.C.)

Federal Court, Hughes J.—Ottawa, April 1 and 2, 2009.

Public Service — Labour Relations — Judicial review of adjudicator's decision, order dealing with policy grievance raised by respondent as bargaining agent against Treasury Board (Department of Fisheries and Oceans) — Respondent representing ship officers employed by federal government — Parties subject to collective agreement — Employer unilaterally issuing "Fleet Circular" altering manner in which officers to be compensated for "familiarization" — Respondent filing grievance on own behalf, on behalf of members — Requesting in particular retroactive compensation for employees negatively affected by Circular — Grievance denied — Adjudicator allowing grievance, ordering retroactive compensation — Whether Public Service Labour Relations Act (PSLRA), s. 232 restricting adjudicator's power in policy grievance to grant retroactive compensation — While s. 232 limiting broader powers of adjudicator in considering policy grievance, provision coming into play only if individual or group grievance pre-existed or could have existed — In present case, grievance filed shortly after release of Circular, when no individual or group who could start grievance on own behalf could be identified — Therefore, no individual or group grievance herein "could have been brought" when policy grievance instituted, PSLRA, s. 232 inapplicable on facts of case — Even if s. 232 applicable, adjudicator having jurisdiction to award retroactive compensation based on s. 232(a), (b), which state that adjudicator may give decision "declaring" that collective agreement be given certain interpretation or that award has been contravened — Use of word "requiring" in PSLRA, s. 232(c) contemplating something more than simple declaration — Words "requiring the employer to ... apply ... administer ... collective agreement" in s. 232(c) sufficiently broad to contemplate order for retroactive payment — Therefore adjudicator properly exercising powers conferred by PSLRA, s. 232 in granting order — Application dismissed.

Construction of Statutes — Public Service Labour Relations Act, s. 232 limiting broader powers of adjudicator in considering policy grievance — Adjudicator nevertheless having jurisdiction to award retroactive compensation based on s. 232(a), (b), which state that adjudicator may give decision "declaring" that collective agreement be given certain interpretation or that award has been contravened — Use of word "requiring" in PSLRA, s. 232(c) contemplating something more than simple declaration — Words "requiring the employer to ... apply ... administer ... collective agreement" in s. 232(c) sufficiently broad to contemplate order for retroactive payment — Individual or persons whose agreement interpreted as affording retroactive payments should not be required to engage in second grievance to obtain payments — Holding that PSLRA, s. 232(c) precluding adjudicator's power to grant retroactive award of compensation would lead to absurd result.

STATUTES AND REGULATIONS CITED

Public Service Labour Relations Act, S.C. 2003, c. 22, **s. 2**, ss. 208–214, 215–219, 220–232.

CASES CITED

APPLIED:

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, 304 D.L.R. (4th) 1, 82 Admin. L.R. (4th) 1; *Public Service Alliance of Canada v. NAV Canada* (2002), 59 O.R. (3d) 284, 112 D.L.R. (4th) 68, 17 C.C.E.L. (3d) 26 (C.A.).

AUTHORS CITED

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis Canada Inc., 2008.

APPLICATION for judicial review of an adjudicator's decision and order (2008 PSLRB 52) dealing with a policy grievance raised by the respondent as bargaining agent representing ship officers against the Treasury Board (Department of Fisheries and Oceans). Application dismissed.

APPEARANCES

Caroline E. M. Engmann for applicant.

David J. Jewitt and *Jodi Martin* for respondent.

SOLICITORS OF RECORD

Deputy Attorney General of Canada for applicant.

Jewitt McLuckie & Associates for respondent.

The following are the reasons for judgment and judgment rendered in English by

[1] HUGHES J.: This application deals with a narrow issue, the scope of section 232 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, **s. 2**. The issue arises out of a decision and order of an adjudicator who dealt with a policy grievance raised by the Canadian Merchant Service Guild as bargaining agent against the Treasury Board (Department of Fisheries and Oceans). That decision is dated July 9, 2008 and may be cited as [*Canadian Merchant Service Guild v. Treasury Board (Department of Fisheries and Oceans)*] 2008 PSLRB 52.

[2] For the reasons that follow I find that the adjudicator properly exercised the powers conferred by section 232 of the Act in granting the order at issue in a manner consistent with the proper interpretation of that section. Therefore the application for judicial review of that decision is dismissed.

[3] It is appropriate to start with the *Public Service Labour Relations Act*, newly enacted in 2003. That Act provides, in section 208 and following, for a number of types of grievances. Those grievances may proceed through various levels and ultimately may be referred to an adjudicator for final determination. Those different types of grievances are:

a. Individual grievance as provided for in sections 208 to 214 of the Act. In general the scope of such a grievance is defined in paragraphs 208(1)(*a*) and (*b*):

> **208.** (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved
>
> (*a*) by the interpretation or application, in respect of the employee, of
>
> (i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or
>
> (ii) a provision of a collective agreement or an arbitral award; or
>
> (*b*) as a result of any occurrence or matter affecting his or her terms and conditions of employment.

b. Group grievance as provided for in sections 215 to 219 of the Act. In general the scope of such a grievance is defined in subsection 215(1):

> **215.** (1) The bargaining agent for a bargaining unit may present to the employer a group grievance on behalf of employees in the bargaining unit who feel aggrieved by the interpretation or application, common in respect of those employees, of a provision of a collective agreement or an arbitral award.

c. Policy grievance as provided for in sections 220 to 232 of the Act. In general the scope of such a grievance is defined in subsection 220(1):

> **220.** (1) If the employer and a bargaining agent are bound by an arbitral award or have entered into a collective agreement, either of them may present a policy grievance to the other in respect of the interpretation or application of the collective agreement or arbitral award as it relates to either of them or to the bargaining unit generally.

[4] Section 232 of the Act provides limitations as to an adjudicator's decision respecting a policy grievance where the matter was or could have been the subject of an individual grievance or a group grievance. It says:

> **232.** If a policy grievance relates to a matter that was or could have been the subject of an individual grievance or a group grievance, an adjudicator's decision in respect of the policy grievance is limited to one or more of the following:
>
> (*a*) declaring the correct interpretation, application or administration of a collective agreement or an arbitral award;
>
> (*b*) declaring that the collective agreement or arbitral award has been contravened; and
>
> (*c*) requiring the employer or bargaining agent, as the case may be, to interpret, apply or administer the collective agreement or arbitral award in a specified manner.

[5] It is this provision, section 232, which is presently before this Court for consideration. I am advised that this section has not previously been the subject of judicial interpretation.

[6] The underlying factual basis of the adjudicator's decision is not in dispute. The respondent, Canadian Merchant Service Guild, is the certified bargaining agent for ship's officers employed by the federal government for instance on Coast Guard and Defence vessels. These officers are required to work up to 12 hours a day for up to 28 consecutive days. They are paid according to a scheme that takes into account days designated as "off-duty" or "on-duty" including provisions as to a "lay-day" bank. The parties are subject to a collective agreement including a letter of understanding.

[7] In January 2007, the management of the Department of Fisheries [and Oceans] unilaterally issued a "Fleet Circular" which altered the manner in which officers were to be compensated for what was termed "familiarization". The respondent filed a grievance on its own behalf and on behalf of its officer members. At that time no particular member or group of members could be identified who would be subject to the "Fleet Circular" in question but it was expected that at least some officers would be subject to the effect of that Circular. Included in that grievance was a request for a declaration and for retroactive compensation as follows:

> The Guild … hereby requests a declaration that the Fleet Circular FC-03-2007 is in breach of the Employer's obligations under the collective agreement and further requests an Order compensating any officer affected retroactively.

[8] The grievance was denied and the relief sought refused. The respondent sought adjudication on the basis of a policy grievance. The adjudicator on July 9, 2008 gave the decision presently under review and ordered (at paragraphs 48–51):

V. Order

The policy grievance is allowed.

Fleet Circular FC 03-2007 must be amended by deleting any reference to job familiarization under the heading Application.

Employees who have been negatively affected by the application of Fleet Circular FC 03-2007 in the case of job familiarization must be compensated retroactively.

I will remain seized for a period of 120 days from the date of this decision to address any matters relating to its implementation.

[9] The applicant takes no issue with the order except as to paragraph 50 which requires retroactive compensation. The applicant says that section 232 of the Act restricts the power of an adjudicator in a policy grievance such that retroactive compensation cannot be granted. I am advised that at no time during the grievance or adjudication was this point raised. Other than the order itself, the adjudicator's decision does not address this point.

SCOPE OF REVIEW

[10] Counsel for the parties are agreed that the scope of review of the adjudicator's decision must be considered in light of the recent decisions of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1. S.C.R. 190 and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. *Dunsmuir* states that there are now only two standards of judicial review, reasonableness and correctness. The standard of correctness applies to a determination of true questions of jurisdiction. The majority of the Supreme Court in *Dunsmuir* wrote at paragraph 59:

> Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[11] This does not mean that, even in applying a "correctness" standard, the Court should not take into consideration the manner in which a tribunal has interpreted its own statutes. Such interpretation can be instructive and accorded deference. As stated by the majority in *Khosa* at paragraph 25:

> I do not share Rothstein J.'s view that absent statutory direction, explicit or by necessary implication, no deference is owed to administrative decision-makers in matters that relate to their special role, function and expertise. *Dunsmuir* recognized that with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision-maker rather than to the courts. This deference extended not only to facts and policy but to a tribunal's interpretation of its constitutive statute and related enactments because "there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported" (*Dunsmuir*, at para. 41). A policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the

legislative regime" (*Dunsmuir*, at para. 49, quoting Professor David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93). Moreover, "[d]eference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context" (*Dunsmuir*, at para. 54).

[12] In the present case I am satisfied that the appropriate standard of review is that of correctness since the question is one of interpretation of section 232 of the Act having regard to the jurisdiction of the adjudicator in making the order in question and in particular, paragraph 50 of that order requiring retroactive compensation.

INTERPRETING SECTION 232

[13] Section 232 operates as a limitation to the broader powers of an adjudicator in considering a policy grievance. I repeat that section:

> **232.** If a policy grievance relates to a matter that was or could have been the subject of an individual grievance or a group grievance, an adjudicator's decision in respect of the policy grievance is limited to one or more of the following:
>
> (*a*) declaring the correct interpretation, application or administration of a collective agreement or an arbitral award;
>
> (*b*) declaring that the collective agreement or arbitral award has been contravened; and
>
> (*c*) requiring the employer or bargaining agent, as the case may be, to interpret, apply or administer the collective agreement or arbitral award in a specified manner.

[14] This provision only comes into play if one of two circumstances has occurred:

a. There was an individual or group grievance already. This is not the circumstance here.

b. There could have been an individual or group grievance.

[15] In considering what is meant by "could have been" an individual or group grievance one must consider whether, and to what extent, those words are intended to apply to a situation other than one where, for instance, an individual or group grievance was threatened or prepared but never actually instituted. Such a question does not need to be answered here since, on the facts of this case, the grievance was filed very shortly after the release of the Fleet Circular in question and at a time when no particular individual or group who could possibly start a grievance on their own behalf could be identified. Retroactive compensation was requested as stated at paragraph 3 of the agreed statement of facts as provided to the adjudicator (applicant's record, at pages 253 and 254) simply on behalf of "any Officer affected retroactively". Thus, no individual or group grievance "could have been brought" at the time that the policy grievance was instituted.

[16] I find therefore, on the facts in this case, section 232 of the Act is inapplicable.

[17] In any event, even if section 232 were to apply, I find that the adjudicator had jurisdiction to award retroactive compensation. Looking at the structure of section 232 we find that paragraphs (*a*) and (*b*) provide that, even in these restrictive circumstances, the adjudicator may give a decision "declaring" that a certain interpretation be given respecting a collective agreement or an award has been contravened. Thus the section is quite clear as to what it means when it comes to the power to "declare" something.

[18] Paragraph 232(*c*) uses a different word, it uses the word "requiring" certain things to be done. It is clear that something more than a simple declaration is contemplated. What may be "required" to

be done is that an employer or bargaining agent is to "interpret, apply or administer" the collective agreement or arbitral award in "a specified manner". One of the ways in which the agreement is to be applied and administered is to pay persons subject to the agreement in accordance with the manner as determined by the adjudicator.

[19] The applicant's counsel argues that all an adjudicator can do given the restrictions of paragraph 232(*c*) is make a declaration as to the manner in which payment ought to be made and leave it to the parties, possibly to a subsequent individual or group grievance, to secure payment if it is not forthcoming. This would render the process futile and absurd. Why go through a second process when the matter has already been determined. The words "requiring the employer to … apply and administer the collective agreement" are sufficiently broad so as to contemplate an order for retroactive payment.

[20] In this regard, I refer to the excellent analysis by the late Catzman J.A. in giving the reasons of the Ontario Court of Appeal in *Public Service Alliance of Canada v. NAV Canada* (2002), 59 O.R. (3d) 284.

[21] At paragraphs 27 to 35 he reviewed the progress of the law, particularly at the Supreme Court of Canada level, from affording only a narrow approach to judicial interpretation of statutes respecting arbitral powers in labour matters to one of giving judicial deference to the arbitration process. He said at paragraph 33:

> In subsequent cases, the Supreme Court continued to recognize expanded powers of labour arbitrators. *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paperworkers Union, Local 219*, [1986] 1 S.C.R. 704, 28 D.L.R. (4th) 1, held that courts have no jurisdiction to entertain damage claims for breach of rights under collective agreements and that such jurisdiction resides exclusively with the arbitrator. Writing for the court, Estey J. recognized that Canadian labour law had moved toward recognizing broad arbitral powers and that "[w]hat is left is an attitude of judicial deference to the arbitration process" (p. 721 S.C.R.).

[22] The same line of thinking should apply here. It would be absurd, given the language of paragraph 232(*c*), to hold that a person or group of persons who have been successful in obtaining an interpretation of an agreement that would afford them retroactive payments should possibly have to engage in a second grievance to obtain those payments. I refer to Professor Sullivan where she says in her book *Sullivan on the Construction of Statutes*, 5th ed., LexisNexis, at pages 300–301:

> **Propositions comprising consequential analysis**. The modern understanding of the "golden rule" or the presumption against absurdity includes the following propositions.
>
> (1) It is presumed that the legislature does not intend its legislation to have absurd consequences.
>
> (2) Absurd consequences are not limited to logical contradictions or internal incoherence but include violations of established legal norms such as rule of law; they also include violations of widely accepted standards of justice and reasonableness.
>
> (3) Whenever possible, an interpretation that leads to absurd consequences is rejected in favour of one that avoids absurdity.
>
> (4) The more compelling the absurdity, the greater the departure from ordinary meaning that is tolerated.

[23] To hold that paragraph 232(*c*) of the Act precludes a retroactive award of compensation would be an absurd result.

CONCLUSION AND COSTS

[24] In the result, therefore, I will dismiss the application to quash the adjudicator's decision and order.

[25] The respondent was successful and is entitled to costs. Having regard to my discussion with counsel at the hearing, I fix those costs at $2 500.

JUDGMENT

FOR THE REASONS GIVEN,

THIS COURT ADJUDGES that:

1. The application is dismissed;

2. The respondent is awarded costs fixed at the sum of $2 500.