IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canada Post Corporation v. Canadian Union of Postal Workers,* 2020 BCSC 503

Date: 20200402
Docket: S197995
Registry: Vancouver

Between:

Canada Post Corporation

Petitioner

And

Canadian Union of Postal Workers

Respondent

Before: The Honourable Madam Justice Iyer

On judicial review from: Decisions of the Arbitrator, dated April 4, 2018 and May 6, 2019, pursuant to Canada Labour Code, R.S.C., 1985, c. L-2

Reasons for Judgment

Counsel for Petitioner:	A. Woodhouse
Counsel for Respondent:	T. Ramusovic
Place and Date of Hearing:	Vancouver, B.C. February 11 and 12, 2020
Place and Date of Judgment:	Vancouver, B.C. April 2, 2020

INTRODUCTION

[1] Canada Post Corporation ("Canada Post") applies for judicial review of two related arbitration decisions. The underlying dispute concerns Canada Post's use of contractors to deliver mail from its delivery centre in Kelowna, British Columbia ("Delivery Centre"). Canada Post was using the contractors to cover the absences of regular and suburban mail carriers ("RMSCs"). The Canadian Union of Postal Workers ("Union") grieved this practice, arguing that Canada Post ought to have used specific classifications of employees to do this work.

[2] In his decision dated April 4, 2018 ("2018 Decision"), the arbitrator upheld the grievance, ordering Canada Post to cease using contractors to cover RSMC absences on any route at the Delivery Centre. In his decision dated May 6, 2019 ("2019 Decision") (collectively, "Decisions"), the arbitrator made monetary awards against Canada Post arising from its failure to comply with the 2018 Decision.

[3] The parties agree that the standard of review is reasonableness. However, the Union argues that I ought not to decide the judicial review application on its merits because of Canada Post's delay in seeking judicial review. For the reasons that follow, I find that Canada Post's delay is unreasonable, and decline to decide the merits of the petition.

BACKGROUND

The Grievance and Grievance Process

[4] Starting in January 2014, the Rural and Suburban Mail Carriers' Collective Agreement ("Collective Agreement") required Canada Post to cover the absences of RSMCs at the Centre by assigning Permanent Relief Employees ("PREs") or On Call Relief Employees ("OCREs") to fill in for them.

[5] Canada Post created PRE and OCRE positions at the Delivery Centre. However, not all of these positions were filled. Canada Post used PREs/OCREs and also contract workers to cover the absences of RSMCs.

[6] In 2016 and 2017, CUPW filed a number of grievances about this practice. In particular, Grievance 22 claimed that Canada Post was improperly using contractors to cover RSMC absences and was giving them preferential treatment on work assignments, contrary to various provisions of the Collective Agreement. Canada Post denied the grievance on the basis that it was using all available PREs and OCREs for this work before turning to contractors, and was taking steps to ensure that sufficient PREs and OCREs would be available in the future.

[7] The parties agreed that the grievance should be decided under the Collective Agreement's "regular arbitration" process, as opposed to its "formal arbitration process". Article 9.18 of the Collective Agreement requires that certain kinds of grievance be decided by formal arbitration, unless otherwise agreed by the parties, including the following: termination of employment, employees in the bargaining unit as a whole, employees in more than one area, the Union as such, policy grievances, significant monetary claims, or complex issues. All other grievances are decided by regular arbitration.

[8] Unlike formal arbitrations, regular arbitrations are intended to be speedy and informal, with limited precedential effect. No lawyers are involved; documents and authorities are exchanged the week before the hearing; and parties are encouraged to limit the use of witnesses. In practice, hearings often include a back-and-forth dialogue between the arbitrator and the parties' representatives. While the decision of the arbitrator is final and binding in relation to the particular dispute, the Collective Agreement expressly provides that the decision has no precedential effect on other arbitrations. The arbitrator may either pronounce the decision orally at the end of the hearing or pronounce it in writing within 30 days of the decision. If the decision is given orally, the arbitrator is simply required to "give a brief resume of his or her reasons in writing thereafter."

[9] There is no question that both Canada Post and CUPW are sophisticated parties with a long and continuing relationship. The arbitrator is one of two individuals named under the Collective Agreement for this region to preside over

both formal and regular arbitrations. That means everyone involved has had extensive experience with the Collective Agreement in general and with the regular arbitration process in particular.

The 2018 Decision

[10] The arbitration hearing occurred on February 28, 2018. The Union called two witnesses and tendered the following documentary evidence:

- staffing charts showing how Canada Post scheduled RSMCs, PREs, OCREs and contractors for a week in 2016 and from October 10, 2016 to January 6, 2107,
- a summary of the routes provided to four contractors from September 2016 to January 2017, and
- meeting minutes from a union management meeting on August 31, 2017.

[11] Canada Post did not present any evidence.

[12] The hearing (which included other grievances that are not in issue) took less than an hour and the arbitrator asked questions of the parties' representatives.

[13] In the 2018 Decision, the arbitrator referred to relevant provisions of the Collective Agreement, and summarized the grievance. He found the following facts:

- Since the filing of the grievance in January 2017, Canada Post had increased the number of PRE and OCRE positions, but three of 11 PRE positions remained vacant as did nine of 12 OCRE positions.
- Canada Post continued to use contractors who were able to refuse work assignments and bargain for preferred work assignments in ways that bargaining unit employees could not.

- At the time of the hearing, there were seven PREs, one OCRE and four contractors. The four contractors' "permanence [was] reflected in the postal installation's consistent integration of the contractors in daily route and absence coverage records" and their work was recorded in the same way as was done for PREs and OCREs.

[14] The arbitrator summarized the Union's position as follows: Canada Post's failure to hire and retain enough PREs and OCREs was contrary to the Collective Agreement because it resulted in bargaining unit work being assigned to "dependent contractors who are employees under the Canada Labour Code", denial of seniority rights and limiting the work and earnings available to bargaining unit employees. Failing to hire and retain enough employees is not the kind of "disruption" that justifies an exception to the rule that bargaining unit work must be performed by bargaining unit employees.

[15] The arbitrator summarized Canada Post's position as follows: the Collective Agreement was not violated because no PRE or OCRE lost any work opportunity, it was not clear that any contractor had received preferred route, and no contractor was assigned vacation leave coverage. Further, the Collective Agreement does not prohibit using contractors when there are insufficient employees to do cover the work available.

[16] The arbitrator's analysis and conclusion are set out in the following paragraphs:

> [19] Except for prevention and recovery from operational disruptions from circumstances beyond the employer's control, the agreement does not allow the employer to provide replacement of route holders for short or long-term absences by an employee outside the bargaining unit; or by a contractor who in all respects except name is an RSMC; or by replacements RSMC holders must provide in smaller postal installations, who must be qualified, meet security requirements and sign a voucher contract.
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> [20] The employer did what it could in the circumstances it confronted in 2016 and 2017 to fulfill its legislated and adopted delivery standards and the union exercised patience for the past two years waiting for the employer to hire and retain the complement of employees required to cover the absences.

> [21] Despite the challenges, I find that throughout this time, the employer was and continues to be in contravention of the collective agreement by having bargaining unit work performed by non-bargaining unit "contractors" (who might be dependent contractors and employees of the employer) in contravention of Articles 3.01, 8, 13[1], 28.01(b) and Appendices "E", "F" and "H".

[17] As is usual in regular arbitrations, the arbitrator retained jurisdiction over the interpretation and implementation of his order.

The 2019 Decision

[18] In early May 2018, the Union learned that Canada Post had not changed its practices and continued to use the contractors on its roster in the same way as before the 2018 Decision. At a union/management meeting in June 2018, Canada Post's representatives informed the Union's representatives that, in their view, the 2018 Decision did not prohibit them from using contractors to cover RSMC absences going forward.

[19] Shortly afterwards, the Union wrote to the arbitrator to complain about Canada Post's position, invoking his retained jurisdiction. Canada Post did not object to the letter's characterization of its position that the 2018 Decision did not have to be followed, and it did not write to the arbitrator seeking clarification of the award. Instead, the parties and arbitrator set a second hearing date of August 20, 2018.

[20] That hearing did not occur because of fires in the Kelowna area, and it could not be rescheduled until May 1, 2019.

[21] As the arbitrator explained in the 2019 Decision, the purpose of that hearing was simply to hear the Union's request for enforcement of the order made in the 2018 Decision because of Canada Post's failure to comply with it. The arbitrator rejected Canada Post's submission that the 2018 Decision "made new law and enlarged union rights under the collective agreement" such that it created a "precedent" that the Union was now trying to rely upon in a subsequent arbitration.

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[1] The parties agree that this is a typographical error and it should read "14", not "13".

[22] The arbitrator expressly stated that the proceeding was not a "subsequent arbitration"; it was a continuation of the 2018 arbitration. Turning to the evidence before him, the arbitrator found that after the 2018 Decision, Canada Post had increased the number of contractors. It also increased the number of PRE and OCRE positions, but not all were filled. He set out in a table the number of days contractors worked in the 47 weeks following the date of implementation of the 2018 Decision and summarized it as follows:

> Contractors performed bargaining unit work on 270 days in the 47 weeks for which dates were submitted. … In almost all weeks, the assignments to two or more contractors were for all workdays in the week and often covering the same route each day.

[23] Based on this evidence and his knowledge of the situation respecting use of contractors in other mail delivery centres, the arbitrator concluded that Canada Post could meet its legislated delivery standards without using contractors in violation of the Collective Agreement. Since it had not done so, he made monetary orders against Canada Post to remedy its continuing contravention.

ANALYSIS

Preliminary Issue: Admissibility of Affidavit Evidence

[24] The Union objects to certain paragraphs of Affidavit #1 of Danny Lau, the employer's representative who attended the arbitration hearings. It submits that I should disregard paras. 12, 17 and 18 because they contain irrelevant material and/or present argument in the guise of evidence. Canada Post did not press the issue.

[25] Having reviewed the affidavit and the record before the arbitrator, I agree with the Union. To the extent that these paragraphs contain information outside of the record, they are not admissible.

Should the Petition be dismissed because of Unreasonable Delay?

[26] Judicial review is discretionary. Where the petitioner has unreasonably delayed commencing its judicial review, the court may decline to decide the merits of

the petition: *Lowe v. Diebolt,* 2014 BCCA 280 at paras. 38–40. Section 11 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 also empowers the court to decline to hear a judicial review application where it considers that doing so will cause "substantial prejudice or hardship" to an affected person.

[27] In *Lowe,* the Court of Appeal explained how to assess whether a delay is unreasonable:

> [46] What is "unreasonable" will depend on a constellation of factors. The court must consider the underlying administrative scheme – how does it operate and what are its objectives? To what extent might those objectives be undermined by delay? The court must also consider the interests of the parties – is the issue brought forward on the judicial review of critical importance to one or the other party? On the other hand, will the delay result in hardship, prejudice, or injustice? Because judicial review is concerned with matters of public law, the effect of proceeding with the judicial review or of terminating it on the proper functioning of an administrative regime must also be considered.

[28] Canada Post submits that the delay of roughly 22 months between the date of the 2018 Decision and July 17, 2019, when it filed the petition, is reasonable because it did not understand the 2018 Decision. It says it was unsure about the decision's "scope and effect" because it appeared to create a precedent (contrary to Article 9.24 of the Collective Agreement) about the use of contractors going forward that, in Canada Post's view, could constrain its statutory right to contract out mail delivery work under s. 13(5) of the *Canada Labour Code,* R.S.C. 1985, c. L-2. Canada Post says it "attempted to exercise self-help before engaging the process of this Court."

[29] The evidence does not support Canada Post's characterization of what occurred. The 2018 Decision unambiguously required Canada Post to stop using contract workers to replace RSMCs on any route at the Centre one month from the date of the decision. Canada Post failed to comply with that order. Any confusion on Canada Post's part related to the arbitrator's reasoning, not to the order itself.

[30] Further, it was the Union and not Canada Post that sought to bring the matter back before the arbitrator. Canada Post did not write to the arbitrator requesting

clarification of the 2018 Decision. Rather, at the joint union/management meeting in June 2018, Canada Post simply informed the Union of its position that the 2018 Decision did not prevent it from continuing to use contractors.

[31] Canada Post's conduct strongly suggests that it chose not to comply with the 2018 Decision because it disagreed with it, not because it was confused about what it said. The court ought not to condone such conduct.

[32] The underlying administrative scheme emphasizes the need for speed and finality in the resolution of labour relations disputes in general and between these parties in particular.

[33] The Supreme Court of Canada has warned about the harm caused by delay in the resolution of labour disputes generally. For example, in *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230, a dispute over the pension rights of retired employees, Cory J. wrote (at 306–307):

> Unresolved disputes fester and spread the infection of discontent. They cry out for resolution. Disputes in the field of labour relations are particularly sensitive. Work is an essential ingredient in the lives of most Canadians. Labour disputes deal with a wide variety of work related problems. They pertain to wages and benefits, to working conditions, hours of work, overtime, job classification and seniority. Many of the issues are emotional and volatile. If these disputes are not resolved quickly and finally they can lead to frustration, hostility and violence. Both the members of the work force and management have every right to expect that their differences will be, as they should, settled expeditiously. Further, the provision of goods and services in our complex society can be seriously disrupted by long running labour disputes and strikes. Thus society as a whole, as well as the parties, has an interest in their prompt resolution.
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> Legislators have recognized the importance of speedy determination of labour disputes. By the enactment of labour codes they have sought to provide a mechanism for a fair, just and speedy conclusion of the issues. The legislators have gone further and attempted to insulate the decisions of the various labour boards, tribunals and arbitrators from review by the courts. In earlier times, the courts resisted legislative attempts to restrict their ability to review the decisions of various labour boards. However, over a period of time they have accepted the vital importance of labour tribunals and adopted a more restrained approach in reviewing their decisions.

[34] The parties expressed their mutual intention to resolve disputes such as this quickly and finally by creating an expedited arbitration process in their collective agreement. The features of the regular arbitration process, such as the non-involvement of lawyers, the minimal requirement for written reasons, and the limited precedential effect of decisions, all demonstrate that they want disputes such as this decided as efficiently as possible. It is worth repeating that the 2018 Decision was made after an hour-long hearing of two related grievances, and that the continuation was originally scheduled for August 20, 2018, roughly two months after the Union sought the arbitrator's assistance. These facts underscore that the process was designed and used for speedy dispute resolution.

[35] The limited precedential effect of decisions made under the regular arbitration process implies that the issues resolved using this process are not of critical importance to the parties going forward. While the Decisions affect the use of contractors to replace RMSCs at the Delivery Centre, they cannot be used as precedents for the use of contractors (whether to replace RMSCs or other employees) at other locations.

[36] Turning to prejudice, the Union says that its members at the Delivery Centre were prejudiced because Canada Post's non-compliance with the 2018 Decision exacerbated the "toxic working relationship" between Canada Post and the Union there and had a negative impact on the Union's "ability to effectively represent its members."

[37] The evidence does not support that conclusion: the longstanding labour relations history of Canada Post and the Union is peppered with disputes, many of them acrimonious. More evidence would be required to demonstrate that the impact of delay in the resolution of this particular dispute prejudiced employees at the Delivery Centre.

[38] That said, there is no hardship, prejudice or injustice to Canada Post in declining to decide the merits of the petition because of the narrowness of the

dispute and its lack of precedential effect. In its submissions on the merits, Canada Post seeks to advance arguments that were not made before the arbitrator. The Union objects on the basis that they should have been made below. Declining to decide the merits of this petition would give both parties the opportunity to make full arguments before an arbitrator in a subsequent proceeding involving the use of contractors to replace RMSCs in another mail delivery centre if that issue is important to them going forward. They could also choose to have that issue decided by a formal arbitration process.

[39] Canada Post relies on the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 as promoting a "culture of justification in administrative decision-making" that is enhanced by judicial oversight. While *Vavilov* and its companion cases make important changes to selection of the standard of review and the meaning of judicial review on the reasonableness standard, these decisions do not change the law governing the discretion to dismiss a petition for unreasonable delay.

[40] In conclusion, I do not accept Canada Post's explanation for its delay in seeking judicial review. I therefore find that the delay was unreasonable and decline to hear the merits of the petition. Adjudicating on the merits now would not only run counter to the proper functioning of labour dispute resolution in general, but more importantly, would disregard the parties' contractual choices about how to resolve their disputes.

CONCLUSION

[41] The petition is dismissed with costs to the Union.

"Iyer J."