Court of Queen's Bench of Alberta

Citation: Alberta Union of Provincial Employees v Alberta, 2019 ABQB 577

Date:
Docket: 1903 13095
Registry: Edmonton

Between:

Alberta Union of Provincial Employees,
Guy Smith, Susan Slade, and Karen Weiers

Applicant

- and -

Her Majesty the Queen in Right of Alberta

Respondent

- and -

United Nurses of Alberta

Intervenor

Reasons for Decision
of the
Honourable Mr. Justice Eric F. Macklin

Introduction

[1] In August 2018, the Alberta Union of Provincial Employees (AUPE) entered into a Collective Agreement with Her Majesty the Queen (HMQ) which included a "Wage-Reopener" provision allowing for the determination by arbitration of wages, salaries, or pay grade adjustments.

[2] Three interest arbitrations, including one between the AUPE and HMQ, began together on June 11 and continued on June 17, 2019, before an Arbitration Panel chaired by Arbitrator Phyllis Smith QC (Interest Arbitration Panel).

[3] On June 13, 2019 the Government of Alberta introduced the *Public Sector Wage Arbitration Deferral* Act, SA 2019, c P-41.7 (Bill 9), purporting to delay interest arbitration hearings arising from a number of public sector collective agreements. On June 19, 2019, Bill 9 passed third reading and in anticipation that it would soon receive Royal Assent, the continuation of the hearing scheduled for June 21 - 22 did not proceed. On June 27, new dates of July 8 - 9, 2019, and August 7 - 9, 2019, were set for the continuation of the hearings before the Interest Arbitration Panel.

[4] Bill 9 received Royal Assent and came into force on June 28, 2019. The continuation dates of July 8 - 9 were released.

[5] AUPE brings this application for an Interim Injunction effectively staying the operation of Bill 9 so that the interest arbitration currently in progress will continue.

Background

[6] AUPE and HMQ entered into a Collective Agreement in August 2018 following extensive negotiations and a mediation that took place over a period of six days. The resulting Collective Agreement operated retroactively to April 1, 2017, and is in effect until March 31, 2020.

[7] The Agreement includes a "Wage-Reopener" provision requiring the parties to commence negotiations no later than January 15, 2019, to reach an agreement on the wages payable in Year 3 (April 1, 2019 to March 31, 2020). It further provides that if the parties have not agreed on the wage adjustment by March 31, 2019, either party may give written notice to the other of its desire to submit resolution of the wage adjustment to interest arbitration. The arbitration hearing was required to be held no later than June 30, 2019, and any wage adjustment ordered would be retroactive to April 1, 2019.

[8] The Agreement also provided that in reaching its decision, the Arbitration Panel shall consider the matters identified in s. 101 of the Alberta *Labour Relations Code*, RSA 2000, c L-1 or s. 38 of the *Public Service Employee Relations Act*, RSA 2000, c P-43, including the "general economic conditions in Alberta."

[9] In January 2019, AUPE and HMQ entered into wage-reopener negotiations. AUPE also did so with Alberta Health Services (AHS) for two groups of employees - Auxiliary Nursing Care (ANC) and General Support Staff (GSS). The parties agreed to have all three interest arbitrations heard by the same Panel, chaired by Phyllis Smith QC. Hearing dates were scheduled for June 11, 17, 21- 22, 2019 and August 7-9 and 12, 2019.

[10] On May 19, 2019, HMQ sought the consent of all parties to an adjournment of the arbitration proceedings. No consent was given.

[11] On May 23, 2019, HMQ requested an adjournment from the Chair of the Interest Arbitration Panel of the hearing scheduled to begin on June 11, 2019. The application was dismissed by the Chair. In her reasons, the Chair stated she had no jurisdiction to grant the requested adjournment in the face of the wording of the Collective Agreement that "the Arbitration shall be held by no later than June 30, 2019," and a clause in the Collective Agreement that prohibits an arbitrator from "altering, modifying or amending" any of its terms. Accordingly, the arbitration proceeded on June 11 and continued June 17, 2019. Continuation dates were still scheduled for June 21 - 22 and August 7 - 9 and 12, 2019.

[12] On June 13, 2019, the Government of Alberta introduced Bill 9. As a consequence, the dates of June 21 - 22 were released. The preamble to Bill 9 reads:

> WHEREAS the Government of Alberta is committed to providing high-quality frontline services for Albertans;
>
> WHEREAS the Government of Alberta is committed to balancing its budget by 2022-2023 fiscal year;
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> WHEREAS public sector compensation is the largest government expenditure, constituting over half of the Government of Alberta's operating expense;
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> WHEREAS significant changes have occurred in Alberta's economy since the 2018-2019 Third Quarter Fiscal Update and Economic Statement;
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> WHEREAS the Blue Ribbon Panel on Alberta's Finances, an expert panel appointed by the Government of Alberta will deliver a final report by August 15, 2019, and time is required to gather other information on Alberta's economy and the Government of Alberta's financial state; and
>
> WHEREAS the Government of Alberta needs to gather and fully consider the information and advice prior to wage arbitration hearings under collective agreements in respect of 2019-2020 that affect the Government of Alberta as an employer or funder . . . .

[13] Bill 9 further provides:

> 2(1) The operation of the arbitration process provided for in a wage-reopener provision is suspended beginning on the date this Act comes into force and ending on October 31, 2019.
>
> (2) For greater certainty,
>
> a) No arbitration hearing shall be commenced, continued or completed and no arbitration decision shall be rendered in respect of a wage-reopener provision during the time period beginning on the day this Act comes into force and ending on October 31, 2019...
>
> ...
>
> 3 A reference in a wage reopener provision to a deadline date or a scheduled date for the holding of an arbitration hearing that is on or before November 30, 2019 shall be read as
>
> (a) a reference to a deadline date of December 15, 2019 for the holding of the arbitration hearing if the wage reopener provision includes a reference to a deadline date or scheduled date that occurs during the time period beginning on June 30, 2019 and ending on October 1, 2019 for the holding of the arbitration hearing...

[14] Bill 9 received Royal Assent and came into force on June 28, 2019. The continuation dates of July 8 - 9, 2019 were then released. The dates of August 7 - 9 are still being held pending the outcome of this application.

[15] On June 24, 2019, AUPE and three of its members filed their Statement of Claim in these proceedings seeking to have Bill 9 declared to be of no force and effect as it breaches the right of freedom of association provided in s. 2(d) of the *Charter of Rights and Freedoms*.

[16] On July 5, 2019, AUPE filed this application for an Interim Injunction staying the operation of Bill 9 until a final decision is reached by the Interest Arbitration Panel. On July 19, 2019, the United Nurses of Alberta was granted leave to intervene in this application.

Issues

[17] The three-part test for an interim injunction or the granting of a stay requires an applicant to demonstrate that:

a) There is a serious issue to be tried;

b) Irreparable harm will be suffered if interim relief is not granted; and

c) The balance of convenience between the parties favours the applicant.

RJR-MacDonald Inc. v Canada (Attorney), [1994] 1 SCR 311 at 334, 347-49. These criteria were relied on as the appropriate test in ***R v Beaudry***, 2019 SCC 2 at para 2.

Analysis

[18] The *Proceedings Against the Crown Act* RSA 2000 c. P-25 s. 17(1) precludes a court from issuing an injunction against the Crown. An exception to this prohibition lies in constitutional cases (***Lameman v Alberta***, 2013 ABCA 148 and cases cited there).

[19] HMQ asserts that AUPE is essentially seeking a mandatory injunction requiring the interest arbitration to proceed on August 7-9, 2019. That is not the case. AUPE seeks a stay of the operation of Bill 9 which, if successful, would merely return the parties to the status quo before the legislation was enacted. The interest arbitration would then proceed under the terms of the collective agreement, not as the result of any injunction. It is therefore appropriate to consider this application and the three-part test set out in ***RJR-MacDonald***.

[20] At this point, it is important to emphasize that a legislature, as a democratically elected body, is generally entitled to enact laws as it sees fit in a manner it believes is in the public interest. However, where that legislation interferes with, or impinges upon, constitutionally protected rights and freedoms, it is the Courts' role and obligation to ensure that those rights are safeguarded (***Wells v Newfoundland***, [1999] 3 SCR 199 at para 59).

1. Is there a serious issue to be tried?

[21] Whether the first part of the test has been satisfied is to be determined on the basis of "common sense and an extremely limited review of the case on the merits" (***RJR-MacDonald*** at 348). The Court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will effectively amount to a final determination of the action.

[22] Unless the case on its merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge must consider the second and third stages of the test (***RJR-MacDonald*** at 348).

[23] Bill 9 operates as a stay of interest arbitrations until after October 31, 2019. HMQ further argues this is simply a temporary delay in the arbitration process and, essentially, is no different than delays caused by scheduling issues, illness, or witness unavailability. That is, a delay in the arbitration process is not as significant or as important as the agreement to arbitrate itself. HMQ says that granting an Interim Injunction effectively staying the operation of Bill 9 would essentially result in a complete nullification of Bill 9.

[24] In my view, this is not a temporary delay akin to a scheduling issue, an illness, or witness unavailability. Those are delays that are most often necessitated by factors outside the parties' control. The temporary delay legislated in Bill 9, however, is wholly the result of the unilateral act of one of the parties.

[25] HMQ argues that granting an Interim Injunction will result in the Interest Arbitration proceeding as scheduled and a decision being issued by the Panel. As a result, HMQ argues that it will effectively amount to a final determination. I disagree. The action will still proceed and if ultimately unsuccessful, anything gained (or lost) in the Interest Arbitration will be reversed. As noted below, AUPE has undertaken to hold any wage increase that may be awarded by the Interest Arbitration Board in abeyance pending the outcome of the action.

[26] Both AUPE and UNA, as intervenor, argued that HMQ breached its duty to consult with AUPE before introducing Bill 9, and acted in bad faith by passing the challenged legislation. The parties introduced conflicting evidence and, in order to assess whether a triable issue arises from that conflicting evidence, it would be necessary to hear *viva voce* testimony and assess the credibility and reliability of the testimony. In the context of this interim application, it would go beyond a "preliminary investigation of the merits." It is unnecessary to consider whether HMQ had a duty of pre-legislative consultation and if so whether such a duty may have been breached, because the uncontested evidence establishes a serious issue to be tried.

[27] The Collective Agreement containing the wage-reopener clause was freely negotiated by the parties. Under its terms, the arbitration process, including the selection of an arbitrator, was put into motion and dates were set aside for hearings. On May 19, 2019, HMQ sought consent from AUPE for an adjournment, a procedure properly within the terms of the Collective Agreement. When AUPE refused its consent (as was its right), on May 23, 2019, HMQ then applied to the Chair of the Panel for an adjournment – again another appropriate procedure. The Panel Chair refused the application. HMQ then unilaterally invoked a third approach to obtain the adjournment – legislation that overrode the agreed-upon terms in the Collective Agreement and the decision of the Panel's Chair, obtaining what it could not achieve through the Collective Agreements' procedures by the exercise of legislative power. Bill 9 effectively granted the same relief HMQ had sought from AUPE and from the Panel Chair, and may be seen to have undermined the negotiated contractual terms of the Collective Agreement.

[28] By effectively rendering aspects of the Collective Agreement inoperative, Bill 9 then calls into question the value of associating for the purposes of collective bargaining and entering into a collective agreement. As stated in ***British Columbia Teachers' Federation v British Columbia***, 2015 BCCA 184 ("***BCTF***") at para 285:

> The act of associating for the purpose of collective bargaining can ... be rendered futile by unilateral nullification of previous agreements, because it discourages collective bargaining in the future by rendering all previous efforts nugatory.
>
> (per Donald JA in dissent, affirmed and adopted [2016] 2 SCR 407, 2016 SCC 49 at para 1)

[29] As outlined below, an arbitration within specified timelines is a substantive term of the Collective Agreement. Bill 9 is a unilateral nullification of that term. Bill 9, therefore, may have an impact on the s. 2(d) *Charter* right to freedom of association since it raises the issue of whether it makes collective bargaining between the government and employee representatives effectively impossible (see ***Meredith v Canada (Attorney General)***, 2015 1 SCR 125, 2015 SCC 2 at para 45; ***BCTF*** at para 295).

[30] Moreover, the Supreme Court of Canada has recognized that s. 2(d) rights balance unequal power relationships and create a more equal society. In ***Mounted Police Association of Ontario v Canada (Attorney General)***, [2015] 1 SCR 3, 2015 SCC 1, the Court confirmed that protection for a meaningful process of collective bargaining requires that employees have the ability to pursue their goals and that, at its core, s. 2(d) aims

> ... to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society... [at para. 58]

[31] The ability of one party to unilaterally change the terms of a collective agreement also raises a serious issue about whether that balance of power protected by s. 2(d) has been infringed.

[32] The serious issue to be tried is whether Bill 9 interferes with AUPE's s. 2(d) right to freedom of association. The first stage of the test has been met.

2. Will AUPE suffer irreparable harm if the Injunction is not granted?

[33] AUPE led evidence through various lay witnesses and an expert that if an Injunction is not granted in its favor, AUPE members will consider AUPE to be powerless and unable to advocate on their behalf. These witnesses suggest that the AUPE membership will lose confidence in their union. I do not believe any of this evidence to be properly before me, as much of it is hearsay and rhetoric. The affidavits contain opinions, legal conclusions, and arguments by lay witnesses, and such evidence is given little weight: see ***Alberta (Human Rights and Citizenship Commission) v Alberta Blue Cross Plan***, 1983 ABCA 207 at para 8; ***Rau v Edmonton (City)***, 2015 ABCA 5 at para 19. The expert was not qualified before me and he purports to draw legal conclusions and opinions that are properly within the purview of the trial judge. I attach no weight to that evidence.

[34] HMQ argues there is no irreparable harm here. Bill 9 creates only a short delay in the arbitration process (to December 15, 2019 at the latest), and any monetary implications will be retroactive to April 1, 2019. Therefore, HMQ argues any delay in the arbitration or the arbitration decision would result in no irreparable harm to AUPE and its members. I agree that irreparable harm does not result from the length of the delay or any possible financial loss, whether actual or delayed.

[35] However, when considering whether AUPE and its members will suffer irreparable harm, the effect of Bill 9 goes deeper than mere delay or short-term monetary loss.

[36] The only evidence before the Court is that AUPE made significant concessions, including two years without any wage increases and forgoing its right to strike, in return for HMQ's agreement to arbitrate within express timelines. Given that the only concession by HMQ and the only benefit to AUPE was HMQ's agreement to arbitrate the issue within specified timelines, that term must be considered substantive. AUPE will have fully lost that agreed-upon concession by HMQ, even if AUPE is ultimately successful at trial, and its right to have the arbitration within the specified timelines will not be recoverable.

[37] In addition, the likelihood of irreparable harm arises from the damage to the relationship between the parties.

[38] Bill 9 is a unilateral action by one of two parties to a collective agreement, freely negotiated, to amend the terms of the agreement. AUPE compromised its position and its rights in order to reach the agreement. As stated above, the term now being amended by the legislation is substantive, therefore Bill 9 is a substantial interference with associational activity (see ***Mounted Police Association of Ontario v. Canada (Attorney General)***, 2015 SCC 1 at para 75; ***Ontario (Attorney General) v Fraser,*** 2001 SCC 20, [2001] 2 SCR 3). It will cause irreparable harm to AUPE and its members if HMQ is allowed to unilaterally alter a substantive term of the Agreement as it would mean that no agreement it has ever reached, or may reach in the future, with HMQ is safe from the threat of legislative change.

[39] There will accordingly be irreparable harm to future negotiations, possibly leading to a justifiable refusal to negotiate and compromise. The alleged harm is not the delay in receiving retroactive wage increases – it is the harm to the bargaining relationship between the parties, only one of whom can use its power to amend an "agreement."

[40] AUPE has established that it will suffer irreparable harm if the Interim Injunction is not granted. The second stage of the test has been met.

3. Balance of convenience

[41] The third branch of the test requires the court to consider the harm to each party and for whom an interim injunction is most convenient. The court must also consider the interest of the public (***RJR-MacDonald*** at 348).

[42] When assessing the balance of convenience, the Court must consider the benefits to the public the statute was intended to convey. The Supreme Court in ***Harper v Canada (Attorney General),*** [2000] 2 SCR 764, 2000 SCC 57 noted that when assessing the balance of convenience, the motions judge must assume that the legislation is directed towards the public good and serves a public purpose. The Court stated (at para 9):

> Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

[43] However, the court must also consider whether denying the injunction may deprive the applicants of their constitutional rights because of the time involved in getting a matter to trial (***Harper*** at para 5). While governments clearly have a mandate to write legislation and govern in the public interest, their extensive power to do so is not unlimited and must be tempered by reasonable limits imposed, also in the public interest. In constitutional cases, it is especially important to ensure that the public interest is protected: ***RJR-MacDonald*** at 346-47.

[44] AUPE argues that an interim injunction staying the operation of the legislation would provide a public benefit greater than the public benefit of the continued operation of the legislation. Accordingly. the onus is on AUPE to establish that proposition (***RJR-MacDonald*** at 349; ***PT v Alberta***, 2019 ABCA 158 at para 75).

[45] The first two clauses in the preamble to Bill 9 read:

> WHEREAS the Government of Alberta is committed to providing high-quality frontline services for Albertans;
>
> WHEREAS the Government of Alberta is committed to balancing its budget by 2022-2023 fiscal year. . . .

[46] The Government is charged with the responsibility of promoting and protecting the public interest. These first two clauses support this position. It is necessary for the Court to consider, however, whether the public interest may be better served by an Interim Injunction staying the operation of Bill 9.

[47] The final two clauses in the preamble to Bill 9 read:

> WHEREAS the Blue Ribbon Panel on Alberta's Finances, and expert panel appointed by the Government of Alberta, will deliver a final report by August 15, 2019, and time is required to gather other information on Alberta's economy and the Government of Alberta's financial state; and
>
> WHEREAS the Government of Alberta needs to gather and fully consider the information and advice prior to wage arbitration hearings under collective agreements in respect of 2019-2020 that affect the Government of Alberta as an employer or funder ...

[48] These last two clauses appear to speak directly to HMQ's failure to obtain AUPE's consent to an adjournment of the interest arbitration hearings and the dismissal of its subsequent adjournment application before the Chair of the Interest Arbitration Panel. As stated in the previous section, if Bill 9 is allowed to operate in periods during which AUPE would otherwise have been entitled to arbitration under the collective agreement, AUPE and its members will suffer irreparable harm. Having given up its right to strike and two years of no increase in wages, it will have lost the one benefit it did gain – having an arbitration take place within specified timelines. Further, it may be difficult, if not impossible, to confidently negotiate detailed terms and conditions of a collective agreement knowing that at any time after an agreement was reached, the terms and conditions could be unilaterally amended or nullified by legislation.

[49] Information about Alberta's finances was provided to the Interest Arbitration Panel for the hearings that took place on June 11 and 17, 2019, which were specifically set aside to consider economic evidence. In accordance with the wage-reopener clause, the Panel is required to consider evidence of economic conditions in reaching its decision. If the Blue Ribbon

Panel's Report is admissible for consideration by the Interest Arbitration Panel, then AUPE will have had no input into that Report and no opportunity to challenge its findings.

[50] Given the current highly publicized economic climate in Alberta, it is unclear what other information HMQ would be seeking on Alberta's economy and financial state to support its position. Further, Alberta's economy and financial state is constantly evolving and changing, so a snapshot at one point in time may not reflect the situation later in negotiations. As the term of this Collective Agreement ends on March 31, 2020, and the parties will begin negotiations for the next agreement sometime between December 1, 2019 and February 1, 2020, HMQ will then have the opportunity to obtain and rely upon whatever other information it feels necessary and relevant to those negotiations.

[51] AUPE has undertaken to hold any wage increases awarded by the Interest Arbitration Panel in abeyance pending the final determination of this action. Further, the delay established by the legislation is not because the evidence of economic conditions is not available; it has been provided to the Blue Ribbon panel. It has been, or can be, provided to the Interest Arbitration Panel, as required by the wage-reopener provisions. In all of the circumstances, it is difficult to see how HMQ will be harmed by the continuation of the Arbitration hearings in accordance with the Collective Agreement. A stay of the legislation will not hinder the stated goals of providing high quality front-line services for Albertans and balancing the budget by 2022-23.

[52] It is generally in the public interest that parties to otherwise valid agreements, freely negotiated, honor their obligations under those agreements. Members of the public often turn to the Courts or other dispute resolution mechanisms to enforce contracts or seek remedies for their breach. As the Supreme Court of Canada has said:

> Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer-term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance... (***Bhasin v Hrynew***, 2014 SCC 71 at para 60).

[53] Members of the public expect that parties to an agreement will honor commitments made in agreements, and they reasonably expect that parties with whom they contract, regardless of who that may be, will honor the terms of the agreement made. It is no different if one of the contracting parties is the government. A member of the public expects, and is entitled to expect, that an agreement reached with the government will be honored. While the breach of any contract may result in the payment of damages to the aggrieved party, a unilateral legislated change to a collective agreement may also result in the breach of the s. 2(d) Charter rights of the aggrieved party, as argued in this case.

[54] It is in the long-term public interest for the public to see that its government cannot unilaterally change its contractual obligations through legislation that may interfere with Charter rights. On balance, when considering the harm or potential harm to each party and the public interest, I conclude that the balance of convenience favours granting the Interim Injunction. The final stage of the test is met.

Conclusion

[55] An Order granting an Interim Injunction staying the operation of Bill 9 as it relates to AUPE is hereby granted. In accordance with the undertaking of AUPE, the Order will include a direction that any wage increases awarded through the Interest Arbitration shall be held in abeyance until this claim is finally determined.

Heard on the 29th day of July, 2019.
Dated at Edmonton, Alberta this 30th day of July, 2019.

Eric F. Macklin
J.C.Q.B.A.

Appearances:

Patrick Nugent and Adam Cembrowski
of Nugent Law Office
for the Applicant

G. Alan Meikle QC, David Kamal, and Mandy England
of Alberta Justice & Solicitor General
for Her Majesty the Queen

Gordon W Nekolaichuk
of Chivers Carpenter
for the Intervenor