In the Court of Appeal of Alberta

Citation: Southern Alberta Institute of Technology v SAIT Academic Faculty Association, 2013 ABCA 161

Date: 20130510
Docket: 1101-0214-AC
Registry: Calgary

Between:

The Board of Governors of the Southern Alberta Institute of Technology

Appellant
(Applicant)

- and -

The SAIT Academic Faculty Association

Respondent
(Respondent)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Myra Bielby
The Honourable Mr. Justice Brian O'Ferrall

Memorandum of Judgment
Delivered from the Bench

Appeal from the Order by
The Honourable Madam Justice C.S. Phillips
Dated the 23rd day of June, 2011
Filed on the 4th day of August, 2011
(2011 ABQB 392, Docket: 1001-09109)

Memorandum of Judgment
Delivered from the Bench

Paperny J.A. (for the Court):

[1] This appeals involves the interpretation of certain provisions under a Collective Agreement for pay in lieu of notice. The majority of the arbitration board determined that in calculating that amount, the employer should have included a pro rata portion of an education allowance paid to the instructor in addition to his base salary. The board's decision was upheld by the Queen's Bench justice on judicial review. The employer appeals.

Background

[2] John Kearney was hired by SAIT as an instructor in 2005. In 2006 he became entitled to an annual education allowance of $1,500. That allowance was paid to him monthly in addition to his base salary, and appeared as a separate line item on pay stubs.

[3] Mr. Kearney's position was abolished in June 2009. The relevant article of the Collective Agreement relating to pay in lieu of notice and severance pay for abolished position is s 16.01:

> The Employer shall give a permanent academic staff member three (3) months working notice or pay in lieu of notice that the academic staff member's position is to be abolished effective immediately. In addition to the such working notice or pay in lieu, the academic staff member shall receive severance pay in the amount of one (1) month pay for each full year of service to a maximum of twelve (12) months.

Payment of vacation pay upon termination is governed by s 39.02:

> An academic staff member will be paid for any vacation earned but not taken at the time of termination.

[4] The Collective Agreement does not define the term "pay". It defines "annual salary" as the amount of academic staff member's regular salary, but excluding any other compensation except that Acting Incumbency Pay shall be included for overtime calculations only. Section 1.01 (d).

[5] In calculating the amount of pay in lieu due to Mr. Kearney on termination, the employer included only his base salary and nothing for the education allowance. The Faculty Association filed a grievance of that decision.

Decision below

[6] The majority of the Arbitration Board determined that the Education allowance was an item of compensation, paid for the employee's service. It also considered whether the term "pay" as used

in s 16.01 had the same meaning as "salary". It noted that there were varying usages of the word "pay" in the Collective Agreement, sometimes but not always, equating to salary. The majority concluded that "pay" in s 16.01 means something more than salary. They wrote at paragraphs [39] - [40]:

> The intent of "pay in lieu" in the first two usages in the article, then, seems very clear: the employee is to be paid as if he were working out a period of notice, continuing to provide service to the Employer. "Pay" in that context must include the Education Allowance, which we heard the Employer continues to pay for abolishees who are given working notice.
>
> Then, the article uses "pay" twice more to establish entitlement to severance. Occurring as they do in such close proximity to the two earlier usages of "pay" in this Section, there is a particularly strong presumption that the latter usages carry the same meaning. Nothing in the Section contradicts that presumption. And the conclusion is fortified that "pay" carries identical meaning when one considers that, again, the word "salary" was readily available as part of defined terms elsewhere in the Agreement if the parties had wished to signify a contrary intention.

[7] The arbitration board then considered entitlement of vacation pay in s 39.02 and the majority said at paragraph [45]:

> ... the vacation that the employee has earned but not taken at the time of termination is a certain number of "work days", for which he or she is entitled to be remunerated as if still at work. Just as for pay in lieu of notice under Article 16, this means that the abolishee should continue to earn Education Allowance as part of his or her vacation payout.

[8] The majority concluded that the meanings of these two sections were not ambiguous making it unnecessary to rely on past practice to choose between contending interpretations.

[9] On judicial review, the reviewing justice, concluded that applying a reasonableness standard of review was appropriate and found that the Arbitration board properly identified the interpretive issues associated with the meaning of the word "pay" in the relevant articles, that the board's reasoning was transparent, rational and intelligible and that its interpretation fell within the range of reasonable outcomes. She also held that it was not unreasonable for the board to conclude there was no ambiguity and therefore no error in refusing to admit extrinsic evidence of past practice.

Grounds of appeal

[10] The employer on appeal submits the judicial review judge erred in finding the board's interpretation of "pay" was reasonable or alternatively that she erred in finding that the term was not

ambiguous and erred in excluding past practice evidence to aid in the interpretation of the collective agreement.

[11] We disagree. The chambers judge's selection of reasonableness as the appropriate standard of review was correct. Moreover we agree with her conclusion that the board's reasoning was transparent, rational and intelligible and fell within the range of reasonable outcomes.

[12] The appeal is therefore dismissed.

Appeal heard on May 07, 2013

Memorandum filed at Calgary, Alberta
this 10th day of May, 2013

Paperny J.A.

Appearances:

B.B. Johnston
for the Appellant

W.J. Johnson, Q.C.
for the Respondent